REPORTS

AND

CASES,

TAKEN

In the time of Queen *ELIZABETH*, King *JAMES*, and King *CHARLES*;

Collected and Reported by that learned Lawyer

WILLIAM NOY,

Sometimes READER of the Honourable Societie of

LINCOLNES-INNE,

SINCE

ATTOVRNEY GENERALL

to the late KING *CHARLES*.

Conteining moſt Excellent matter of Exceptions to all manner of Declarations, Pleadings, and Demurrers, that there is ſcarce one Action in a Probability of being brought, but here it is throughly examin'd and Exactly layd.

Now tranſlated into Engliſh.

With Two neceſſary Tables of the Caſes and Contents, for the Readers eaſe and benefit.

LONDON,

Printed by *F. L.* for *Matthew Walbancke* at *Grayes-Inne* Gate, and *T. Firby* near *Grayes-Inne* Gate in *Holborne*, 1656.

READER,

TO speak any thing of the *Reporter* is needleſſe; for all have known, or traditionally do know his worth; yet I muſt ſay this in my own defence, (leſt I may by ſome, or moſt, be ſaid to abbreviate his ſummaries) That he was a perſon that hated any thing of Prolixneſs; He was a man that writ *multum in parvo*, or if you'll have that near home, all languagues (as I may ſay) in 24 Letters. Although his Reports are not ſo large as ſome of our Modern Copies of others have been, yet you'll find him upon his pleadings (which is excellent learning, and indeed not throughly traverſed ſince *Plowden*) notably quaint and ſubtle. They came to my hands with very much aſſurance that they were his, and truly upon the peruſal of them I concluded ſo too. The importunities of that friend, and the opportune vacation, gave me ſome inducements to begin, though very much regreting, that I could not give them in their own genuine dialect. Yet I will aſſure you this, That in the tranſlation, where I met with apt and ſignificant words, you have them as he as writ'em. And all matters conning Declarations and pleadings, I have rendred in their proper language. You'll not (which I know is inconvenient in Law) find the thing Rhetorically done. And becauſe indeed they were the words of ſo eminent a Lawyer, I thought too great an arrogancy in me to alter, where I found ſome few Caſes inconſonant to my Iudgement; but rather objected againſt my own errour, and reſolved to ſet down with my opinion of Mr. *Noys* infallibility. It may be Reader you may find ſome miſ-ſlips; but I can aſſure you if there be any, 'tis either the

Printers negligence, (which is the usual Sanctuary of all sorts of writers) or of so mean consequence, that the smallest ludgement may rectifie. In earnest, I have not read more acute Cases since I studied the Law. (Think not I was courted to this Complement by the Stationer) So pithy and materiall, that there is not declaration, plea, or demurrer almost upon any action in the least faulty; but you'll find it here excepted to, answered and adjudged. That whereas almost all other Reporters have discussed another kind of matter, here you'll find little other, But I'll not in my Epistolatory tract contradict my Authors method, but in short conclude.

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The Table

Y

REPORTS and CASES Taken, &c.

Thomſon *againſt* Warner,

EDmeden en Deſcender of the Manno2 of Iſfield in Suſſex the tenant pleads common Recovery with Voucher by the Anceſtor of the Demandant in 35 H. 8. and they were at iſſue upon nuill tell Record, for now it appeared that the record is Iſfield, but it was urged by the Demandant that the record was Ifield until that matter came in queſtion, and for that it was to be preſumed that it was corrupted, prays that it may be amended, and that ſurmiſe was proved. But of the tenants part, an Indenture which leads the uſe of the Recovery was ſhewed, which recites the roll of the Recovery, and in that it was called Iſfield, and it was adviſed by the Court, that the record ſhould remain as now it is; For it was hard, to defeat the eſtate of a man upon ſuch a triſle, for which Judgement was given againſt the Demandant, and by Walmeſly, a Common Recovery not being, but a Common conveyance need not purſue ſuch a ſtrict form as other Writs founded upon a Title.

Farmer *againſt* Downes,

TWo Joyntenants acknowledge a Statute, and their ſeveral lands are taken in execution, and after upon the invalidity of the Statute, they joyntly bring an Audita Querela, and adjudge that the writ ſhall abate, for they ought to have ſeveral writs, for the wrong done to one (by an execution of his lands) is not a tort to the other.

Haſtings *againſt* Blake.

IN debt the Defendant ſaid that he is attainted of Felony, that the Attainder yet continues, and demands Judgement if he ſhall be put to anſwer, and adjudged that he ſhall anſwer, and may be taken in execution, and that ſhall not be prejudicial to the King, for notwithſtanding the execution of the party, the King may have him executed when he will.

2. Upon attaint or outlawed ſhall be put to anſwer in any action againſt them, becauſe it is to their prejudice; But in an action brought by them they ſhall not be anſwered, becauſe it is to their benefit.

3. They ſhall be put to anſwer, by reaſon of the poſsibility of their being pardoned. Note that this Judgement was much againſt the Opinion of Walmeſly, who ſaid it was in vain to put any man to anſwer in an action real or perſonal, who hath in truth nothing to be taken in Execution.

Martin *againſt* Wentworth, 38 Eliz.

DEbt upon a leaſe for 35 years to commence at the Annunciation of our bleſſed Virgin laſt paſt, and the leaſe was made 26 Junii 26 Eliz. rendring a rent of 40 l. annually during the firſt ten years (vid.) 35

Octob. and the laſt day of March by equal portions; and after the end of the ſaid ten years 46l. 13s. 4d. annually the 5 Oct. and the laſt of March, by even and equal portions, the firſt day of payment to begin the 5 of Oct. next. Adjudged that the new reſervation to commence at the annunciation 36 Eliz, although that the term, as to the intereſt doth not commence until the making of it, yet in reſpect of the number of years, it ſhall be accounted of the annunciation of the 36 Eliz.

2. The Words of the firſt payment to be made the 5 of October next, ſhall refer to the firſt reſervation, and by the manner of the reſervation it is impoſsible for the leſſor to have 10 times 40l.

The Lord brought Treſpaſſe againſt a Copyholder for cutting of Elmes, the Defendant preſcribes to cut and diſpoſe all the trees upon his tenancy, &c. adjudged to be an ill preſcription; but otherwiſe of a Copyholder of an inheritance. 2 E. 4. Ne poient succider Bois ſans licence. Note there it is vouched, that a cuſtome that the wife of a Copyhold for life may hold durante viduitate, and agreed to be good. And Taunton Dean cuſtome, that if a Copyholder in fee marries a wife, if the wife ſurvives ſhe ſhall have the Fee, Et ſic è converſo. And agreed to be good, And Yelmeſter cuſtome, that Copyholder for life in extremis may nominate his ſucceſſor to have the Copyhold, paying a reaſonable fine to be agreed upon by the Lord, or if that fail to be aſſeſſed by the Homagee, and a good cuſtome. T. 2 Jac. C. 3. intral. H. 45 Eliz. rot. 156. Powel againſt Pencock, that ſuch a Copyholder for life, according to Yelmeſter cuſtome may preſcribe to cut trees, &c. but otherwiſe of an ordinary Copyholder for life.

Hollingworth *againſt* Parkehuſt.

H. Brings an Audita Querela againſt P. and ſues him upon a Recognizance of a ſtatute ſtaple acknowledged before Poph. chief Juſtice where it was made upon an uſurious contract, and it was agreed, that if there be a communication and an agreement after the forfeiture of a recognizance, and the ſecond defeaſance is for more than 10l. in the hundred, according to the principal debt, yet it is not within the 13 Eliz. ca. 11. of Uſury, but it had been otherwiſe before the forfeiture. And by Glanvil and Walmſly, Anderſon being abſent, that although that the ſecond Defeaſance bears date the ſame day of the payment of the firſt Defeaſance, yet it is not within the ſtatute, for it is not for the forbearance of the firſt principal, but of that penalty, alſo when the Conuſor perceives that he was not able to ſave the forfeiture, it was adjudged that the firſt contract was not Uſurious.

Warberton's Caſe.

A Tenant in tayle, the remainder to B. in Fee of lands held of the Queen, B. dies, his heir of full age; A leaſes to W. who being ouſted brings an ejectione firm and it was prayd that proceedings in the caſe might be ſtaid, Regina in conſulta, becauſe the primer ſeiſin is due, But by Walmſly and Glanvill, that it is not due: and yet Glanvil ſaid that the Court of Wards would have Ward for ſuch reverſion, which ſeemed to him to be hard law, but Serjeant Harris ſaid that it hath been adjudged in the Court of Wards to have Ward for a Leaſe for years.

See Cook on Lit. 46.

Kettlenſhert *againſt* Chatterton.

K. Recovers in debt againſt A. and the money was brought into Court, Yelverton, the Queens Serjeant moved that the money might

might be retaind there to the uſe of the Queen: for the Defendant ſtood fined in the Star-chamber, it was ruled that that was no cauſe.

H. 2. Jac. B R.

A. After many Legacies deviſes the reſidue of all his goods to one Taylor and makes Trott his executor and dies, Trott after accompts before the ordinary, &c. pays the reſidue to Taylor; and thereupon has an acquittance from the ſaid Taylor. Trott dies, and Taylor ſues his Executor in the Court of Requeſts, to accompt de novo; the Executor pleads the acquittance, and the Plaintiff thereupon demurred; Cook Atturney General prays a prohibition, and the Court ſaid, that an Executor ſhall not be compelled to accompt in any Court, although the Court of Conſcience; But by the Court it was agreed, that an Executor of an Executor may be ſued for a Legacy given by the firſt Teſtator.

Fox *againſt* Lee.

Paſ. 3. Jac. B. R.

In debt upon an eſcape, the Plaintiff counts upon a Recovery, &c. and that Lee then Sheriff took the party, and afterwards extra cuſtod. ſuam ad largum ire permittit, without ſaying (extra Cuſtod. predict. in executione predict. exiſtent et remanent and it was ruled that it was good enough, for it ſhall be intended all one cuſtody. ve Dyer 66.

Crabb *againſt* Bales.

A Cuſtome, that a Copyholder for life may nominate one or two that ſhall have the Copyhold lands after his death for a fine to be aſſeſſed by the Homage, if they cannot agree with the Lord, adjudged to be good, H. 6. Iac. C. B. 13 Rot. 2613. Raubus *againſt* Maſon.

Pringe *verſus* Child.

Intr. T. 2. Jac. B. R. rot. 520.

P. The Vicar of Eaton in the County of Oxon. ſues C. the Parſon impropriate in the ſpiritual Court in Oxford, pro Minutis Decimis. C. ſues a prohibition againſt the Vicar upon a ſurmiſe of a Preſcription, P. comes and pleads the firſt endowment made Anno Dom. 1310. by which the minute tithes were alloted to the Vicar C. demurrs, and adjudged for the Plaintiff, for the Parſon cannot preſcribe againſt the firſt endowment.

Sir Rich. Champion *againſt* Robert Hill.

Paſ. 3. Jac. B. R.

In debt upon the 2 E. 6. for not ſetting out of tythes, the Plaintiff declares, that the Defendant was ſeiſed of the lands in queſtion within that Pariſh, and that the tithes did belong to the Parſon and Vicar (viz.) two parts to the Parſon, and the third part to the Vicar or their Farmors, payable in ſpecie for forty years laſt paſt, that the Plaintiff was Farmer proprietory of the tithes to the Parſon, and Vicar ſpectant, and ſhews the value of the tithes due, and demands the treble value, the Defendant pleads nihil debet per pat. and it was found for the Plaintiff. It was now moved in arreſt of Judgement, becauſe the Plaintiff ought to have brought two actions, as the Parſon and Vicar ought for their ſeveral parts, but reſolved that the action is well brought, for it is a perſonal and one entire debt for one wrong. 32.

Bavage *against* Clark.

Intr. H. 45. E. 17. B. R. rot. 5.

DEbt upon an Obligation, the Defendant pleads, non eſt factum, and at the niſi prius, relicta veriſicatione, cognovit actionem, Judgement that the Plaintiff ſhall recover, and the Defendant in miſericordia, and not, quod capiatur, and by the Court that rule good. That it is ſo uſed in both the B. R. et C. B. contrary is Dyer, 67. pl. 33. H. 6. 34. 34 H. 6. 20. 44 E. 3. 42. 45 E. 3. 10.

Williams *against* Cooke.

Intr. M. 2. Ia. rot. 190.

IN treſpaſſe the Defendant pleads not guilty, and he is found guilty for the entry, &c. in one moiety, and not for the other, and it was moved in arreſt of Judgement, that now it ſhall be intended that they were tenants in Common, Entred that Treſpaſſe lies not, 10 H. 7. 27. 8. E. 4. 8. 18 E. 4. 11. and by the Court that ſhall be a good plea in abatement of the Writ, but if it had been ſo found by the Jury, the Plaintiff ſhould have Judgement, and ſo it was here adjudged, ve infra.

Rud's *verſus* Gime.

R. Brought error upon a recovery in the Chamber, and in the return of the Record and proceedings appears that the firſt expreſſe was ſummons conſuet. &c. without ſaying talis habetur conſuetudo, &c. where there ought to have been an Attachment, and not a Summons, and for that it was reverſed, and the certificate nought, another error was aſſigned, the Judgement there was, that the Defendant be in miſericordia, et quod capiatur *Gomb.*, that is no error but only a ſurpluſage, ve 93. 3. 6. pl. 13. but Fenner was on the contrary opinion, P. 5. Jac. B. R. Banks *againſt* Pebleton, upon error, it is adjudged there to be error, alſo M. 4. Iac. R. B.

Hitcham *againſt* Mutcham.

H. Brings an aſſault and battery in one Writ againſt two by ſeveral precipes, and recovers, and it was ruled by the Court that he ſhall have but one execution, becauſe it appears to the Court that it is one and the ſame treſpaſſe, but if he had ſued them by ſeveral writs, and had recovered againſt them, if he had execution and ſatisfaction againſt one, the other hath no remedie by plea, &c. but by an Audita Querela, but if after execution againſt one, he ſues the other in an Aſſault and Battery, then he may plead that, and ſo it was agreed. T. 3 Iac. intrator, H. 2. Iac. B. R. rot. 1055. inter Brown et Wetton in trover, and ſo alſo M. 4. Iac.

Thore *againſt* Thomas.

Cook. Litt. 54

AFter Confeſsion of waſt the Plaintiff had a Writ of enquiry of damages, and it was found a penny. By the Court that no Judgement ſhould be entered. And by Anderſon if Judgement had been entered it had been error, for the value of waſt ſhall be to 40 d. at the leaſt; 42. E. 3. 13.

Turthers

Turthers *caſe.*

PArſon exchanges his Gleab-land and dies, the Succeſſor enters into the exchanged land, and takes the profits, yet the Succeſſor is bound by his time, et adjurnator, it is clear that the exchange ſhould not have been good, if it had been made after 13 Eliz. But the exchange in our caſe was made before. *Intr. T. 40 Eliz. C. B. rot. 529.*

Allerton *againſt* Eden.

THe Biſhop of Norwich ſeized of three Mannors and of a Rectory, grants the ſaid Rectory to Maunton, &c. and becauſe the Queen had a rent, &c. of thirty three pounds, out of the Rectory, he covenants and grants with N. his Heirs and Aſsigns, that if, &c. he be diſtreyned, &c. for that rent, &c. that then it ſhould be lawfull for N. &c. to diſtreyn for ſo much in the three Mannors, which after were granted to Wood-houſe, N. afterwards grants the Rectory with ſuch a clauſe of diſtreſſe in the ſame mannors to B. and adjudged that N. might lawfully grant that over as well with a nomine pœnæ, although it be not Annuall; and the diſtreſſe by B. adjudged lawfull.

Albany *againſt* Manny.

IN debt, Agreed that if A. be out-lawed in debt, and obtains a Releaſe of the party of that debt, and after by Act of Parliament all out-laries are pardoned. When the partie is ſatisfied, then the out-lary is diſcharged, for the Releaſe is a ſatisfaction in law. *9 Rep. 51. b.*

Lichfield *againſt* Sandell.

IN Waſt, it was ſaid by Anderſon and Walmeſly, that if the iſſue be joined upon a Collateral poynt, as if the party entred as deviſee or executor, yet the Jurors ought to have the view of the place, for the damages given, although that the waſt be confeſſed; for the iſſue is tryed by the Verdict, but otherwiſe if by Demurrer; but Glanvile was of contrary opinion, for it is not ſufficient to come and view any part of the land in queſtion as in an Aſsize, but the Jurors ought to have the view of every parcel, for the aſſeſsing of damages, 34 H. 6. 45. a. And if any of the parties diſſwade the Jurors from making a view, it is puniſhable in the Star-chamber, for hindering the courſe of Juſtice.

Butler *againſt* Monnings.

A. Seiſed of three acres, grants a rent-charge out of them to M. and after enfeoffs I. S. of two acres, M. covenants with I. S. and grants that he will not charge them two acres, for the ſaid rent with any diſtreſſes after, and B. the terre-tenant of the other acre, being diſtreyned, brings a replevin; And the queſtion was if the covenant and grant by M. be a releaſe of the rent Glanvile that it is a releaſe, Anderſon on the contrary opinion; but by the Court, if it be a releaſe, the terre-tenant of the other acre may plead that, for by that the rent is extinguiſht.

Note, that if a man marry the wife of a Tradeſman, during her widowhood, ſhe cannot uſe that Trade if ſhe had not been an Apprentice

to it &c. but of the Trades excepted in the Statute, as Tanners, &c. Lege Statute.

Note by the Court, that Proces out of the Court of Requests is not sufficient warranty to imprison any man, and Glanvile advised Heale for his Clyent to bring false imprisonment.

HEale moved this Case. A. convicted of felony, and discharged by his Clergy, takes a wife, and they bring an accompt upon a cause before the Conviction for goods of the wife. And by the Court it is good; For those goods could not be forfeit by the Conviction, vide Cook lib. 2 46. for false imprisonment brought after pardon for out-lary, 29 Assize 63.

Windhams Case.

8. rep. 34. a Dyer a. 19. IF Tenant in taile makes a Lease for years, according to the 32. H. 8. that that shall bind the issue of the tenant in taile, but not those in the remainder.

Note, by the Iustices upon pleading of a conveyance by bargain and sale actual entry ought to be pleaded, and that possession, per 27 H. 8. de usibus is not sufficient.

Whiddons Case.

VVHiddon brought an annuity, and declares of a grant by deed, the Defendant said it was delivered to the Plaintiff as an Escrow upon certain Conditions, to be his deed, and shews the Conditions not to be performed. And adjudged upon the Demurrer sans agreement per le plt. that a deed cannot be averr'd as an Escrow to the same parties.

A deed delivered upon conditions to be performed.

Wimberly *against* Thompson.

AN action upon the case how as the Plaintiff being possest of a Fountain of Silver to the value of 400 l. and delivers it to one to transport over Seas, and sell it; And in the account it appears that the Factor afterwards melted the Fountain, and converted it to his own use, for which the Plaintiff brought his action upon the case, and they were at issue, and it was moreover alleaged, that where in truth he was damnified to the value of 400 l. yet there made oath, that the said Fountain was but the value of 280 l.. And by reason of the said oath, it was adjudged that the Plaintiff nil capiat perbre.

First an oath of every one shall be taken as a certain truth, and for that reason the Statute of . and 22 H. 7. which gives power to punish perjuries in the Star-chamber, were made, for no punishment was for perjury at the Common-law, be 7 & 8 Eliz. 242.

2. By that action the intent of the Jury shall come in issue, as when they will give in Damage that which cannot be tryed, for they are sworn to keep their own counsel.

3. If this action lye, all Testimonies would be terrified to speak the truth.

No

4 No Preſident can be produced of ſuch an action, which is a great argument that it would not lye.

5. If that action may lie, the Plaintiff may have it upon any wager of Law, which is unreaſonable, and againſt law.

Williams *againſt* Roberts.

VVIlliams brought debt againſt Roberts as Executor, and had judgment de bonis Teſtatoris, and a fieri fac. was awarded, the Sheriff returns nulla bona, upon which the Plaintiff ſurmiſes that the Defendant had waſted the goods, and prates a ſcire fac. againſt him to ſhew cauſe why he ſhould not have execution de bonis propriis, and it was awarded that he ſhould have no ſuch execution, until the Sheriff had return'd a devaſtavit. Yet the 9th H. 7. Executors 9. An Executor pleads plene adminiſtravit, which is found againſt him, and there a ſpecial fieri fac. of the goods of the deceaſed, and if it can appear that they are waſted, then de bonis propriis, and ſo it was adjudg'd. *where an execution ſhall be de bonis propriis.*

But there was found by the Verdict that he had aſſets, but here it doth not appear if he hath aſſets or not, ſo there is a diverſity between the caſes. Alſo by the devaſtavit the Judgement ſhall be altered (that execution ſhall be de bonis propriis) which cannot be without a return of the Sheriff, Ergo.

Johnſon *againſt* Heydon.

FOr lands in Northpreton in the County of Somerſet, upon a ſpecial verdict found not to be comprized in a fine, It was rul'd by the Court, that a Manor in reputation which is not a Manor in truth, do's not paſs by the name of a Manor in a Fine, or by a Common-recovery; for they are grounded upon original Writs which ought to be certain, and not to be taken by Intendment. But otherwiſe it is of a grant or ſeoffment, for there the intent of the parties ſhall help it.

March *againſt* Curtis.

A. Leaſes for years, rendring a Rent upon Condition that the Leſſee ſhall not parcel out the land nor any part thereof from the houſe, &c. the Leſſee grants all his term in the houſe and part of the land, and afterwards he leaſes the part reſerv'd. for half a year, the rent is in arrear and he demands, after which he accepts a rent due, at an other day, after the title of entry, and afterwards he enters, and his Entry adjudged lawfull.

Firſt, the Condition is broken; For although that by the aſsignment of the term, the Land is not parcell'd from the Houſe, but rather the Houſe from the Land: yet the intent. For the ſeparation of it from the houſe is the ſubſtance of the Condition. 1.

Secondly the acceptance do's not take away his entry, for the Condition is for a Collaterall thing, otherwiſe it is of a Condition of reentry for non-payment of rent, according to Pemaul's Caſe in Cooks Reports. 2.

Martin *againſt* Vaux.

Conſideration to forbear a debt a good aſſumpſit.

AN Action upon the Caſe, and declares, that with his Teſtatour, &c. he delivered certain wares to I.T. and I.H. &c. ad computum inde red. dend. by I. T. and after that, &c. I. T. goeth over Seas, and the Teſtatour dyeth, and that after, &c. I. T. ſent into England 100 Kintalls of wood, &c. to ſatisfie the Plaintiff of his account, which wood came to the hand of the Defendant, who delivers parcel of it to the Plaintiff in ſatisfaction of part of the account, &c. and the Defendant ſuper ſe aſſumpſit that if the Plaintiff would forbear the ſaid I. T. for the reſidue, untill his return into England, which he hop'd to be within three months or thereabouts, that then the Defendant would ſatisfie the Plaintiff all that ſhould appear to be due upon the accompt. By vertue of which he hath forborn three months, and that 3000 l. was due and in arrear upon the ſaid accompt, which the Defendant hath not paid, per quod actio, &c. And upon the non aſſumpſit it was found againſt the Defendant, &c. and in arreſt of Judgement, divers exceptions were taken to the Declaration.

1. Firſt, becauſe he ſaid the Teſtatour delivered certain wares to I. T. and does not ſhew what they were in certain; diſallowed by the Court, becauſe in that action the wares are not demanded, but the action is only grounded upon the aſſumpſit, ſo the 20th Aſſize 3. in treſpaſſe the Plaintiff declares for the taking of Charters, and not ſhews what; And adjudg'd good enough. Becauſe in the action of Treſpaſs, the Plaintiff only demands damages, and not the Charters themſelves, ve. 47 E. 3. 3. Tho. Paines caſe, that if an accompt be brought for the very wares, there they muſt ſhew the Certainty. So note the Diverſity.

2. Secondly, it was alleadged that the wares were delivered to two ad computum inde reddend. by one, therefore not good, for both are accomptable, by reaſon of a joint delivery. The Court was of the contrary opinion, becauſe it was the folly of I. T. ſo to accept the goods upon ſuch delivery, by which he only is chargeable.

3. Thirdly, the aſſumpſit is not good, becauſe the forbearance is not any recompence to the Defendant but to I. T, ſo no conſideration. The Court on the contrary, and eſpecially alſo becauſe the Defendant took into his hands the ſaid wood: and ſo was chargeable to the Plaintiff in an accompt, before the aſſumpſit, but otherwiſe it had been doubtfull.

4. It is not alleadg'd certainly for what time he hath promiſed to forbear the account, ergo the Declaration nought. The Court on the contrary, for he hath averr'd in Fact that he did forbear three months, which is ſufficient, Quere the caſe of Smith and Andrews, that if the Plaintiff will forbear ad pauculum temppus.

5. Fifthly, It is ſaid that the Defendant aſſumes all that ſhall be due upon the account, and the Plaintiff after alleadges that 3000 l. was due upon the account, which is not good, becauſe he do's not alleadge, that a writ of account was brought, and that Auditors were aſſign'd, and that ſo he was found in arrerages 3000 l. The Court on the contrary, For the word account is a proper word to Merchants, for when they deliver wares to their Factors, to render account, thoſe wares are called the account, and ſo by uſuall ſpeaking amongſt them, it is ſaid that the account delivered to ſuch a Factor it amounts to the ſame thing &c. So judgement was given for the Plaintiff.

Paul

Paul Bannings Case, Adjudged p. 37. Eliz.

IN an action on the case, and declares, that where the Plaintiff being seiz'd of an house in D. in the County of L. and shews the estate, &c. and prescribes to have a crosse way in, by, and through a certain way in Sale in the County aforesaid, unto such a Close in D. in the said County, and that the Defendant made a hedge in the Close of D. in the said County, and did stop up his cross way, per quod actio accrevit, and upon non culp. it was found for the Plaintiff, and in arrest of judgement exceptions were taken to the Declaration.

An action upon the case for stopping a cross way.

First, because to prescribe to have a cross path in a certain way, that shall be intended a common cross way, that being in common right, prescription is gone. The Court on the contrary. For though a man cannot prescribe in a common cross way, yet to have a way in, by, and through that common cross way, is otherways, for that is cross, thwart, and through the cross way, and then notwithstanding, that being in the high way, may continue his course without prescription, yet it may be that the cross way be inclos'd and hedg'd on both sides, and for that, to prescribe to pass, cross, and repass through is a good prescription. 1.

Secondly, the crossing and going through the cross way is only shewing the continuance of the cross way, unto such a close, to which the Plaintiff clames way, ergo bon. There the Declaration is not good, because the Village nor the County where B. acre lyes, and to which the way should lead is alleadg'd. Court on the contrary. Because the village and the Cunty is alleadg'd where the nusans was done, for that only is the cause of the Declaration, to which he hath pleaded not guilty, and upon that the issue is join'd, and thence the visne shall come, but if the issue had been join'd upon the prescription of the crosse way, or the right of that, the visne should have come from both villages, (viz.) Where the house is, and out of the Village where the close lies, to which the cross way leads, and then the plea had been ill for the incertainty of the Village or County where B. acre lyes. 2.

White *against* West.

THe case was argued by Herne Serjeant, who took divers exceptions to the pleadings.

First for that it was pleaded, that Sir Henry Blonker being seiz'd of divers lands held in Chivalrie, devises these Lands out of which the Rent in question is issuing, leaving a third part according to the Statute, to descend to his heir, and did not say that it was the third part in value, which otherwise might be taken the third part in quantity, as the third acre, which is not the purpose of the Statute by which he ought to have pleaded, that it was the third part in value, left to the heir by descent. 1.

Secondly, Gerish in right of whom the Avowry is made, intitles him by Blonker, by bargain and sale, and said, prætextu quorum he was seis'd, and did not say, moreover virtute stat. 27. H. 8. as hee ought. 2.

Thirdly, for that he pleads, that Gerish was seis'd in his demesn as of Fee, and so being seis'd, a præcipe was brought against I. S. I. N. Tenants of the Land, by which a common recovery was had; the which is a contrariety in himself, they are terre-tenants and at the same time. Gerish is seis'd of his demesn as of Fee, the which Demesn is ever an actual possession. And for the matter in Law he mov'd, how that the rent is 3.

gone for the Avowry is for a rent ſervice, and that cannot be, for by the Recovery the tenure is deſtroy'd. Warberton Serjeant argued to the contrary, and Firſt anſwered the exceptions.

1. And to the firſt, he ſaid it was well enough pleaded; for where he ſaid that he left the third part to deſtend, it anſwers to the words of the Statute, and if it be not ſufficient in value but only in quantity, that belongs to another to ſhew. As in the 4 Aſſize, upon an apperſciament of Rent, It is ſufficient to make the rate according to the quantity, if it be not ſhewed of the other part, and differs in value.

2. To the ſecond exception, for that it is not pleaded virtute ſtatut. but only prætextu quorum, he anſwered, that that is alſo a General Demurrer, and then that being but a Defect in form, the Statute of Jeofayles helps, and if it will not, yet that pleading ſeems to be good enough, for that the Statute is a general Law, of which the Court ſhall take notice without any Pleader, and ſo good enough the one way, or the other.

3. To the third exception, that there is a Repugnancie in the Pleading, I hold that there is not any, For it is that Geriſh was ſeis'd, &c. untill after a Præcipe was brought againſt I. S. and I. N. terre-tenants, by which it ſhall be intended that after they came lawfully to the tenancy. For another exception which hath been taken, that there is a doubleneſs in the Plea, for that that he pleads quod conceſſit reverſionem et reddit: prædict. To that I ſay, that it is not double, although that the Rent paſſeth as incident to the reverſion, for that the rent is only reſponſable, is in queſtion, and the reverſion goes by the Recovery; And as to the matter in Law, it ſeems that the Rent is not gone by that Recovery, for the tenant in tayl may take of me my Rent, the which is proved by a Caſe in Littleton Seignor M. and Tenant, where if the Lord purchaſe the Tenancy, the Meſnalcy is extinct by the inconvenience, which ſhall not be. 48 E. 3. Avowry, *Trebonies Caſe.* It is held, that if a diſcontinuance be of an eſtate tayl, that yet the Donor may diſtreyn for the Rent, and by a Common-Recovery againſt the Donee the Rent is not taken from the Donor; For he againſt whom the Præcipe was brought, was not Tenant of the Rent but the Donor; and for the rent the Præcipe ſhall be againſt the Pernor. And for that 33. Aſſize of Rent, it was maintain'd againſt the Pernor without naming the terre-tenant, and for the recompence in value it is not gone, in reſpect of the Rent. In Hunt and Capells Caſe it was adjudg'd, that a rent granted out of a Remainder in tayl, was taken away by the Common Recovery, but if tenant in tayl in poſſeſsion grants a rent-charge, and after ſuffers a Common-Recovery, that Rent remains. For at this day a Common-Recovery is but a Common Conveyance. And although that is ejus en le poſt, yet it is in a manner ejus en le per, and it is to the uſe of the tenant, if no uſe be declared to the contrary, and he that recovers ſhall take the advantage of the Condition by the Stat. 23 H. 8. and upon the Judgement to have in value, and he that was in Reverſion to have no Rent. And upon the Extent, the tenant ſhall have the leſſer in value, in regard of the Rent recoup, with which it ſhall not be charged, and upon the Extent the Sheriff cannot aſsign a rent in value, as in 22 E. 4. in a writ of Dower, the Sheriff cannot aſsign a rent in recompence of Dower, nor no other can aſsign a rent, but he that is owner of the Land. And to the intent that no injury nor inconvenience ſhall be to any of the parties, after the Eſtate-tayl is determined, he in the reverſion ſhall have the Extent, for that, that the Land given in value, is not of ſo great a value, as that which he hath loſt, and ſo concludes, that the Rent remain, and pray'd Judgement for the Plaintiff to diſtreyn for it. Et Adjournatur.

Thompſon

THompſon an Atturney of the Common-Bench brought an action on the caſe for theſe words ſpoken to one of his Clyents, Iohn Thompſon is a paltry Fellow, for he doth deal on both ſides, and deceives them which put him in truſt. And after verdict it was mov'd by Heale to have judgement for the Plaintiff, to which the Court aſſented, if other matter be not ſhew'd to the contrary. *Action for ſlan der.*

Weeks *againſt* Tybald.

IN an Aſſumpſit the Plaintiff alleges, that whereas there was a Communication of Marriage between the Plaintiff and the Daughter of the Defendant, that the Defendant upon ſpeech between the Father of the Plaintiff and the Defendant, for free liberty to the Plaintiff to come to the houſe of the Defendant to woo his Daughter, the Defendant then and there affirm'd and publiſh't that he would give 100 l. to him that ſhould marry his daughter with his conſent, &c. By the Court the action doth not lye, for aſſeruit et publicavit doth not make words that include a promiſe. *Entr. M. 2 Jac. B. R. rot. 364*

It is not aver'd nor declar'd to whom the words were ſpoken, and it is not reaſon that the Defendant ſhould be bound by ſuch general words ſpoken to excite ſutors.

Brooke *againſt* Smith.

IN debt againſt an Executor, the Plaintiff recovers, and a fieri fac. de bonis teſtat. and upon that the Sheriff returns, that the Defendant had not any goods of the Teſtators tempore judicii, nor after; The Plaintiff comes to the Court, and ſurmiſes that the Defendant had waſted the goods, and prays a writ to the Sheriff to inquire. But after the very matter being mov'd at the Court, by the Court a Supſedeas was granted, for it was out of the Court and without Preſident, Iuſtice Williams being only of the contrary, and cites the 9 H. 6. 57. that he may have a ſpecial writ, and alſo the caſe between Haworth and Peele. *Entr. H. 2 Jac. B. R. rot. 1169.*

Somerfield *againſt* Stanton.

S. Brought an aſsize of Nuſance againſt St. (and recovered) for diverting of a water-courſe, and after he brings a writ of reciſſ. out of the Chancery, and the reciſſ. found before the Sheriff by the enqueſt, and damages aſſeſt, and the Sheriff levyed double damages, and commits the partie, &c. during the pleaſure of the King, and abates the Nuſance, and St. is remov'd, by Habeas Corp. and the whole matter returned, and the Defendant St. was fined three pound ſix ſhillings eight pence to the King, and was delivered, &c.

Harriſ's Caſe.

AN annuity was brought againſt H. Parſon of Giſtenthorp in Eſſex, and he prayd ayd of the King as Patron, and it was agreed by the Court to be ill, becauſe he did not pray ayd alſo of the ordinary. For it had been no difference if a common perſon had been Patron: So alſo if there be two Patrons, the Parſon ought to pray ayd of both of them. Dyer 26 P. 31 E. 1. C. B. rot. 77. the Prior of Hunt againſt the Parſon of Oxford, prayd ayd both of the Ordinary and Patron. T 23 E. 1 rot. 79. C. B.

Sir

Sir George Walgraces caſe.

NOte, by Popham and Williams that a Plea of tender of amends, is not good where the treſpaſs was voluntary, as for Battery or breaking his Cloſe, or putting Cattle into his grounds.

Mich. 3 Jac. B. R. NOte, that it hath been many times adjudged, that a Trover lies for money although it be not in a bagg, but otherwiſe of Detinue; For by that the Plaintiff ſhall have judgement to recover the thing it ſelf, if &c. and if not then damages, and therefore the thing ought to be known. 40 Eliz. B.R. Holliday againſt Higgs. The Paſſer delivers corn to his Servant to ſell, who does accordingly, and converts the money: the Paſſer brought an action of Trover for the money, and adjudged to be well brought.

Chadron *againſt* Harris.

IF the Eccleſiaſticall Court proceed in a matter that is meer ſpiritual, and pertinent to their Court, according to the Civill Law, although their proceedings are againſt the rules of the Common Law, yet a Prohibition does not lye. As if they refuſe a ſingle witneſs to prove a Will, for the Conuſans of that belongs to them. And agreed alſo, that *Pet. B.R. 300.* if a man makes a will, but appoints no Executor, that that is no will but is void. But if the Ordinary commits the Adminiſtration with that annexed, the Legatory to whom any Legacy is deviſed by ſuch will, may ſue the Adminiſtrator for their Legacies in the ſpiritual Court. Note P. 4. Ja. B. R. Peeps caſe, a Prohibition was denyed where they in the ſpiritual Court refuſed a ſingle witneſs in proof of payment of a Legacy.

Gage *againſt* Peacock.

LEſſee for years of the Manor of Totteridge in the County of Hartford by the Biſhop of Ely, and confirm'd, &c. the Biſhop is depoſed, and the Succeſſor by deed indented reciting the Leaſe, grants to the ſaid Leſſee the Office of Baily of the ſame Manor, for twenty one years, with the fees; and there was great arguing if that were not a ſurrender. See the 21 H. 7. 5. Leſſee for years grants a Rent-charge out of the Lands of the Leſſor, that that was a ſurrender, but it was denyed for Law. See Dyer 200. that a Baily had more Authority than the Keeper of a Park, 39 H. 6. 30 Office of a Baily goes by Leaſe, Brook Offices 47. Foreſterſhip determined by being a Juſtice in Eyre of the Foreſt. N. B. 264 b. the Office of a Coroner determined by being a Sheriff. It was agreed by the Juſtices, that if A. leaſes his Manor rendring a Rent, and after makes B. Baily to receive the Rent. B. ſhall be charged as Receiver, and not as Baily, becauſe the Rent is certain And if Leſſee for years of a Manor be afterwards made Baily, it was adjudged to be no ſurrender.

First, Becauſe the Office of a Baily hath not an intereſt in the land, but an authority only.

For that it hath not any part of the thing demiſed, and judgement accordingly.

Blackaſpers

Blackaſpers Caſe.

A. B. & C. Joyntenants for years, A. grants his part to B. B. & C. make a Leaſe to W. for years, who is ouſted, and brings an Ejectione firm. and counts of a demiſe made to him by B. and C. And the queſtion was now if W. ought to have brought two actions, for B. was tenant in Common with C. of the 3 part. Popham and Fenner that the Writ and Count is good. For tenants in common may joyn in an action, upon 8 H. 6. cap. 9. and one Writ of waſte lyes upon ſeveral leaſes. 44 E. 3. 34. Waiſt 70. Br. 78. but Williams and Yelverton were of the contrary opinion, becauſe that action is in the realty. But it was by all agreed that it had been good policy for W. to have made a leaſe to another, and that leſſee might have one Ejectione firm. without doubt well enough. *Ve. Caſe intr. Chapman & Hill.*

Stockwood *againſt* Sare.

A. deviſes a houſe to his wife in recompenſe of a rent which he had formerly granted to his wife, and that ſhe ſhall have the occupation of B. acre until Mich. next enſuing, paying 40 s. to Nich. his ſon. And after deviſes all his lands, tenements, and hereditaments (except the land before ſpecified and given to his wife) to N. my ſon in tayle, which was in May, and the deviſor dyes 4 dayes before, for by the exception of the land before ſpecified and given, nothing by that paſſeth to Nich. although that the Eſtate of the Wife had been but for one day. But otherwiſe it had been if he had ſaid, except the eſtate before ſpecified and given; For then the reverſion ſhould have paſſed, ſo as to B. acre by Popham, if the Deviſor had lived till after Mich. yet it ſhould not have paſſed to the ſon, becauſe the intent of the Deviſor appears to the contrary, although that the Wife had not any Intereſt in B. acre. *Intr. T. 1. Ja. B. R. rot. 282.*

Draper *againſt* Raſtal.

IN the debt for 34 l. 10 s. The Plaintiff declares that he ſold certain to the Defendant for 66 l. Flemiſh, which amounts to 39 l. 10 s. and upon nihil debet it was found for the Plaintiff, and well, although the action was brought in the debet and detinet, and not in the detinet only, ſee 34 H. 3. 12. 6 E. 3. 40. But if it had been brought in the detinet only, it might have been for the 66 l. flemiſh as well as the other, and ſo Judgement was entred. *Intr. P. 44. Eliz. B. R. rot. 57.*

That it may be brought in the debet and detinet for the flemiſh, if it be a current coyn, as by Proclamation. *H. 29. Iac. B. R. 1394. VVard againſt Regem.*

Ampſon *againſt* Stockburne & Ux.

A. brought debt againſt two upon an obligation of the Wife Dum ſola fuit, and they plead non eſt factum of the Wife, and the iſſue was found againſt them: And by Popham being only in the Court, that the Capias ſhall be only againſt the the Wife. See 9 E. 4. 24 E. to the contrary.

Note, by Popham and Williams, that an Executor in his own wrong ſhall be ſued for Legacies, as well as the lawfull Executor, but Yelverton doubted it.

Croſſe *againſt* Abbot, and others.

M. 3. Iac. B. R.

COppyholder in fee brought a Treſpaſſe, and preſcribes to have the toppings of Trees for Fireboot and hedgeboot, the Defendant juſtifies, by ſale for the Lord of the Manor. And the preſcription for fault in the Plea, of that, viz. to cut ramos aliquarum arborum, which is uncertain, for it may be taken for ſome of any trees, was rull'd to be nought. But otherwiſe it had been well, if omnium Arborum. And Cook ſaid; that ſuch a Copyholder may have an action againſt the ſame Lord, if he cuts the trees: for by that he deſtroys the very thing in which the Tenant preſcribes. Note well 47. E. 3. 22. and 4 E. 2. Treſp. 233. 2 H. 4. 11. That a tenant in Common may have an action of Treſpaſſe againſt his Companion, becauſe he deſtroys the ſame thing given them in their tenancy in Common. And he that hath common of eſtovers ſhall have an action upon the caſe againſt the owner of the land for diſtraining the trees. But ſuch preſcriptions as in the firſt caſe hath been good for a Copyholder for life.

Whitlock *againſt* Chartwell.

Intr. T. 2. *Iac.* B. R. rot. 696. M. and E. Joyntenants for life M. Covenants, Conditioneth and agreeth with B. to have the one moyety of the lands after the death of E. for 60 years, if M. ſo long live, and likewiſe M. demiſes, grants, and to farm letts the other moyety to B. after the deceaſe of M. for 60 years. And adjudged, that the firſt moyety paſſeth by the Covenant, &c. as the Leaſe of that part which appertains to M. and that then the leaſe of the other moyety of the Companion was void. See Br. leaſes 6. 10 E. 4. 4: 20 H. 7. 26. Dyer 150. That a Covenant ſhall amount to a leaſe. Bartons and Habins caſe 37 and 38. Eliz. B. R. That a Joyntenant may leaſe his moyety for years, to commence after his death, or the death of his Companion; And that in that caſe it was adjudged, That if a joyntenant covenants to ſtand ſeis'd to the uſe, &c. of the moyety of his Companion after his death, that no uſe ſhall riſe, becauſe 'tis not but a bare poſsibility.

Drake *againſt* Doylye.

Intr. T. 2. *Iac.* B. R. rot. 189. IN Treſpaſſe it was adjudged, that a preſcription to incloſe againſt the land of another is extinct, by the Unity of Poſſeſsion: Becauſe during the Unity the preſcription ſaild and ceas'd. By Popham and Fenner, That if the owner, having both lands, enfeoffs a nother of the Cloſe which in the bank and hedge is, the Feoffee is bound to maintain the fence againſt the other land, in which the ditch is: For the bank and hedge paſſe by the feoffment. But Yelverton and Williams were of the contrary opinion, that they are bound at their perils the one againſt the other to repair. And by Williams, and not denyed by any, that if I bargain and ſell an acre of land, that is in the middle of my lands, there the Vendee ſhall have a way to it over my lands. See it is adjudged, T. 5. Jac. B. R. Quere, That if a Stranger hath land adjoyning to any part of that acre, if the Vendee is not then bound to purchaſe away of me, or of the ſtranger, or make himſelf a Treſpaſſer.

Parrey

Parrey *againſt* Chauncey.

PReſcription by a Pariſhioner to pay the tenth part of Corn for modus decimandi, for the Hay alſo that grows upon the Head-lands, is not good, becauſe the tenth part is due for the Corn. But ſuch preſcription for the Corn and after rakeings is good, with an averment that they are ſparſæ manus voluntariæ. So preſcription of the tenth part of Hay, and the after graſſe. See H. 15 Iac. C. B. by Hubbard Chief Juſtice, preſcription to make up the firſt crop is good, modus decimandi for the after crop, and Note M. 29. 30 El. B. R. rot. 250. Bayard againſt Adams preſcription as in the firſt caſe is good. But note that Judgment was given againſt the party, becauſe he had not well pleaded the preſcription. *Intr. M. 2 Jac. B. R. rot 346.*

Randall *againſt* Roberts.

IN a replevin adjudged that if A. be ſeiſed of Lands in Sokeſee, and of Gavelkind land, grants a Rent-charge out of them, to B. in fee, and B. dies having iſſue three Sonnes, that the eldeſt Sonne ſhall have all the rent. See Br. rents, 10. and 13. which ſeems to the contrary.

Barnehurſt *againſt* Yelverton.

AN Adminiſtrator recovers in debt againſt A. the Adminiſtration is revok't, yet the Adminiſtrator ſued A. and took him in execution, a ſuper ſedeas was awarded becauſe the execution erronice emanavit, for he cannot ſue him to Execution after the Adminiſtration is revok't. And if in ſuch a caſe A. had eſcaped, the Gaoler might well plead that in diſcharge.

Bott *againſt* Sir Edward Brabalon.

BOtt ſues a Prohibition againſt Sir Edward B. and ſuggeſts that the Defendant is parſon impropriate of W. acre in Warwick, & that there time out of, &c. there hath been a Curat or an Incumbent by the appointment of the ſaid Rector, who adminiſters the ſacraments, &c. and that the cuſtome of that Pariſh time out of, &c. was that the Curat ſhould have all tenths reneiwing within that Pariſh, except decimas granorum which were paid to the Parſon, and that every Pariſhioner who had ſo paid the tenths to the Curate, was diſcharged againſt the Parſon. And that notwithſtanding that, &c. Sir Edward had ſued him, &c. and now he prays a prohibition, and had it but after that ſurmiſe was adjudged inſufficient without argument by the Court, and a conſultation granted, for ſuch Curate cannot preſcribe againſt his Maſter, that may remove him at his pleaſure, and for that it was not good preſcription for the Pariſhioners.

Wiſeman *againſt* Wappthorpe
P. 4. Iac. B. R.

A. makes his wife Executrix, and devilses a Legacie to Wap. and dies, the wife takes upon her the Executorſhip, and takes Wiſeman to Husband, and Wap. ſues the wife in the ſpiritual Court for the Legacy, without nameing of the Husband, and the Husband and wife

prays a prohibition, because the Baron is not named; for that plea allowd in the spiritual Court, and the remedy was to appeal over.

Goodwin *against* the Dean and Chapter of Wells.

GOodwin being Vicar sues them, being parson of a Church, for a pension, in the spiritual Court, and they pray a prohibition, and it was denyed; For that pension is a spiritual thing, for which the Vicar may sue in the spiritual Court. Note, that they intitle themselves to that parsonage by a grant of H. 8. who had it by 31 H. 8. of Dissolutions.

NOte, that Lessee for years reserving a rent payable at a place out of the land leased, and was bound upon condition to pay the Rent secundum form. et effect. Indenturæ prædict. And held by the Court that the Lessee ought to pay the rent at his peril without demand. And according to that Judgement was then affirmed.

Tayler *against* Charey and his Wife.

IN an Assumpsit the Plaintiff declares, that the Wife, dum sola fuit, in Consideration of an Horse and Saddle given to her by the Plt. promised to pay 4 l. to the Plaintiff upon the Feast of the Annunciation next ensuing, vel circiter illius temporis, and alleag'd that she hath not paid it at the day, nor by the space of 40 days after. And that she hath taken to husband one Charey, which hath and still doth deny to pay the same, &c. Notwithstanding the incertainty of Circiter, Judgement was given for the Plaintiff. For it appears that the 4 l. was not paid when the sute was commenced. Note well 3 E. 4. 5. 2. For circa Festum.

Randall *against* Wall.

R. an Infant acknowledges a Recognisance of a Statute staple to Wall, and R. brought an Audita Querela sit C. B. and there adjudged by inspection of the Court within age, and scire fac. awarded against W. and upon a nihil return'd Judgement given, that the Recognisance shall be null'd. W. no writings error in the K. B. because there ought to have been two Nihils return'd, and also because a scire fac. was awarded, where it ought to have been a venire fac. And for these errors the Judgement in the C. B. was reversed. But at the same time hanging the error in B. R. Randall comes to full age, and now again he brings an audita querela in B. R. and prays the benefit of the first inspection, and upon that it was demurrd, and by the whole Court, that he could not have an audita querela again upon that inspection. For the Judges ought to judge upon their own inspection, yet at that time no Judgement was given nor entred.

Intr. H. 2. Jac. B. R. rot. 649.

Birks *against* Simson.

A. devises his land to B. his Cousin, and publishes that Will, and after upon Communication with some of the Friends of the said B. A. said if she will not come to me, and live, &c. she shall not have one penny-worth of my goods and lands. And at another time spoke words to the same purpose: But never makes any mention of his will, or revocation of that, nor call'd any to testifie that, but only spoke that in communication, as abovesaid. And adjudged to be no revocation. And Sir John Jeffrye's case was vouch't, that A. having made his will privately, and

Co. Litt. 113 a. b.

and being ſick he was requeſted by his friends to mak his will, or if he would make any, he anſwered no, yet adjudged no revocation. And another caſe was bought, that A. had made his will, and left it at Fulham, and being ſick in London, he ſaid to ſome preſent there, my will at Fulham ſhall not ſtand. And that was adjudged a good revocation. See Dyer.

Williams's Caſe.

I. Brought a Habeas Corpus for he was commited to the Gatehouſe by the high Commiſſioners, becauſe before that time, he had been ſentenced and enjoyned penance for incontinency, and was fined to the King, and that he ſhould pay coſts. And for not performing all, he was committed. And by the Court, The High Commiſſioners cannot impriſon any man for a Fine impoſed, nor take an obligation for it to the uſe of the King, but they ought to Eſtreat it into the Exchequer; But for the penance or Eccleſiaſtical cenſure lawfully made they may commit the party to priſon, untill he conform himſelf to their ſentence.

Trye *againſt* Burgh.

ADjudged that a Replye of a Court Baron upon Judgement there given, and a levari fac. awarded, cannot ſell the goods, and ſo levy the moneys, without ſpecial Cuſtome. See 4 H. 6. 17, 18 E. 3. 3. That he may deliver the goods to the Recoverer. That the Lord may ſell a diſtreſſe taken for a fine. *Intr. H. 3 Jac. B. R. rot. 649. 8 Rep. 41.*

Stock *againſt* Pope.

T. 4. Jac. B. R.

IN an Ejectione firm. the caſe was thus. A. ſeiz'd of Lands in the Village of S. and alſo of lands in the Village of W. and both thoſe Villages were in the pariſh of S. A. bargains and ſells all his land in S. and covenants to levy a Fine accordingly. And adjudg'd that nothing of the land in W. paſſeth by the bargain and ſale, for S. in that caſe ſhall be intended the Village of S. and not of the pariſh. For a precipe of lands of S. ſhall be intended of the Village and not of the Pariſh. See 39 H. 6. 14. Br. Treſp. 11. *11 Rep. 25. b.*

Brertons Caſe.

IN an accompt againſt B. Judgement was given quod computet, and before the Auditors, he makes an uncertain accompt, and was committed till he had made a full and perfect accompt, and after B. was delivered by Privilege of Parliament; proceſſe was prayd to retake B. and to bring him again into the Court, and it was thought not to be within the Statute of 10 Iac. becauſe B. was not in execution, nor for any certain duty. And by the Court a new cap. ad comput. ſhall not ſtine, for then all that was done before the firſt Auditors will be anulld, as 1 E. 5. 1. b. But a ſpecial Writ ſhall iſſue reciting all the matter, and to bring him again into Court, and being there he ſhall be committed to priſon by the the Court, there to remain, until, &c. ut ſupra, which was done accordingly.

Tanfeild *againſt* Green.

IN an Aſſumpſit the Plaintiff declares, that in conſideration that he would ſeal and deliver a releaſe to I. S. &c. the Defendant would pay to him 5 l. and averrs that he had made the releaſe, &c. and by the appointment of the Defendant, had delivered it to B. to the uſe of I. S. And 'twas adjudged that he had not well perſued and performed the conſideration; but otherwiſe if it had been by the appointment of I. S. himſelf, ve. 8 H. 7. 13. a.

NOte by Fenner and Tanfeild Juſt. and Kemp ſecondary, that if A. be bayle for B. in an action in the Upper Bench, and Judgement is there given againſt B. B. ſues error in the Exchequer chamber, and there the Judgement is affirmd, and coſts aſſeſſed: A. the bail in Upper Bench remains, and ſhall be charged for the Judgement there, but not for the coſts aſſeſt in the Exchequer Chamber upon the Writ of error.

Higgins Caſe.

HIggins brought an Action of Treſpaſſe againſt B. quare vi et armis inſultum fecit upon the wife of the Plaintiff, et ipſam verberavit &c. dans ei plagam mortal. whereof ſhe languiſht for ſix moneths, and dyed, ad grave damnum &c. By the Court, that action will not lie, For the King only is to puniſh felony, except the party brings an appeal. And by Tanfeild alſo, that it will not lye as the caſe is, becauſe the wife is dead, and that ſhe ought to have joyn'd in the action, but otherwiſe of a ſervant. 44 Aſſ. 13. 43. E. 3. 23. which ſeems to the contrary, ve. 6 E. 3. 36.

The King againſt the Biſhop of Wincheſter, &c.

Intr. P. 2. *Iac. rot.* 1331. *Crep.* 30.

BY Popham, Tanfeild and Yelverton in a quare impedit, that double uſurpation does not put the King out of poſſeſſion. Yet Judgement in ſuch a point in the Common-pleas hath been reverſed.

Sir Hugh Wrots Caſe.

THe Dean and Chapter of Wells leaſe to B. land for 21 years, rendring 4 l. rent, to be payed quarterly, &c. B. aſsigns the moiety for years to I. S. paying the half of all ſuch rents as are payable to the Dean and Chapter. It was ſaid by the Court, that the Aſsignee I. S. muſt pay to B. the rent quarterly. For ſuch ſhall intend the quality, as well as the quantity.

Village of St. Andrews *againſt* the Archbiſhop of York, and Counteſſe of Shrewsbury.

Intr. M. 15. *Iac. C. B. rot.* 32.

THe Plaintiffs brought a Quare Impedit againſt the Defendants, and after brought an Aſſize of Darreine preſentment for the ſame Church. The quare impedit is return'd. It was ſaid by the Court that the Aſſize of Dar. &c. ſhall abate. See by Hubbard, but if he had brought another quare impedit, it had been well. And ſo it was reſolved in the Earl of Bedford's Caſe, and by Hutton that the Statute of W. 2. cap. 5. proves it (viz.) quod habeant aſſ. &c. vel, Quare impedit. but not both. ve. 8 E. 3. 17.

Revel

Revel *againſt* Gray.

IN an action of debt, for 5 l. againſt the Huſband and wife, The Plaintiff declares that the wife dum ſola fuit ought him 40 s. and that the Huſband ought the reſt upon accompt. And Judgement upon that was arreſted; for the Wife ſhall not be ſued for the debt of her Huſband.

Traſſell *againſt* Morris.

IN the Argument of Traſſell and Morris's Caſe, the Caſe of the Weaver of Newbury upon a by-Law there made was vouch'd, and of Sawyer againſt Wilkinſon, S. brought an Ore-hide to Leadenhall in London to ſell it, and W. diſtreyns it, Damage feaſant, and juſtifies as Servant to the Maior to which that place appertained for the incorporation. Adjudg'd that the diſtreſs is not lawfull, for it was brought there to be ſold pro bono publico, for goods brought to a Market and expoſed to ſale ſhall not be diſtreyn'd. And the Caſe of the univerſity of Oxford was vouch'd upa by-law: that if any Scholer was indicted he ſhould be tryed per medietatem Scholarium. ve. 2 R. 3. 11. a Clerk of a Court tried per medietatem Clericorum

Gibbs *againſt* Ienkins.

AN action on the Caſe was brought for words in Welſh which ſignified in Engliſh to bear or carry, &c. The words were D'y Deyy D. Congeſt which was uſed for ſtealing. And Judgement was arreſted, for the words ſhall be taken in mitiori ſenſu. *Intr. T.* 15. *Iac. B. rot.* 1654.

Spencers Caſe.

IT was ſaid by Hutton, that by the Civill Law the Parſhioner ought to give notice to the Parſon when the tythes are ſet forth. But it was adjudged, that the Common Law doth not ſo oblige a man.

Yelverton *againſt* Yelverton.

A Man covenants that the aſſurance of all his lands which he ſhall purchaſe afterward, ſhall be to the uſe of A. his Sonne in tayl and that he and his heirs and all, &c. will ſtand ſeiſed to the uſe of his Son in tail. *Hil.* 35. *l. rot.* 272.

Firſt, it was moved that when the Covenanter after by bargain and ſale purchaſeth other Lands, if that purchaſe upon the aſſurance of that ſhall be to the uſes mentioned in the former Deed. And adjudged not, becauſe the ſecond limitation of the uſe upon the purchaſe is expreſt to be, to the uſe of the bargainee and his heirs; And by that the firſt declaration is controld, and an uſe cannot be derived out of an uſe, and alſo becauſe the Feoffor ought to declare the uſes and not the Feoffee. As by Popham; If a man purchaſe Lands, and upon the Livery, to him made, he declares that it ſhall be to the uſe of I. S. that ſhall be void, becauſe none but the Donor can limit the uſes. But now a Feoffment to A. to enfeoff B. to the uſe of C. and B. is enfeoff'd without limitation of any uſe: yet it ſhall be to the uſe of C. So A. Covenants with B. that if he purchaſes lands before Michaelmas, that he will levy a fine of that Land, to the uſe of I S. now if he purchaſe land and levies a fine to him without expreſsing any uſe,

uſe, or without a conſideration; Notwithſtanding that the Law ſayes, that that ſhall be to the uſe of the Conuſor, yet with an averment, it ſhall be taken to be to the uſe mentioned in the firſt Covenant. But if another uſe had been expreſſ'd in the Fine, that ſhould have controlled the firſt declaration of the uſe.

2. A. covenants to ſtand ſeis'd of all lands which he ſhall purchaſe, clearly, as he purchaſed the ſame, &c. yet no uſe ſhall be raiſed by that Covenant, becauſe at the time of the Covenant made he had not any authority or diſpoſition in the land, &c. Fenner. Leſſee for life covenants, after Mich. to ſtand ſeis'd to the uſe of I. S. and his heirs in Fee, before Mich. he purchaſes the reverſion; No uſe ſhall be rais'd as to the Fee, becauſe he had nothing in the Fee at the time of the Covenant making. So Tenant for life, and he in reverſion levy a Fine, and both declare ſeveral uſes; It ſhall enure according to their ſeveral Intereſts. So A. Covenants to ſtand ſeis'd of the land of I. S. to the uſe of B. that is void, and ſo ſhall be, although he purchaſe it afterwards.

Pell *againſt* Towers.

PEll brought a Replevin againſt Towers, and others, who Juſtifie the taking as Bayliffs to the Lord Greevill, for an amerciament at the Court baron of one that was Tenant of the Manor for three ſeveral Defaults: the firſt 2s. the ſecond 20s. the third 40s. Yelverton takes exception to the Avowrye.

1. Firſt, for that he pleads that Sir Foulk Greevill had a Manor, and he, &c. and he had uſ'd time out of mind, &c. to keep a Court Baron, and ſo preſcribes to have a Court baron, the which is incident to every manor of Common right, &c.

2. For that that he preſcribes to diſtrain for an amerciament in any place within the Manor, although that it be out of the tenancy of him that hath offended. Walmeſly took another exception, which is

He preſcribes to have a Court baron, and to hold it before his Steward, which is not good, but if ſhall be held before the Suitors, for the Steward is not Judge. All the three Juſtices agreed to the firſt exception, for a man ſhall not preſcribe in that, which the Law of Common right gives. Anderſon by the way obſerved, that the amerciament was grievous, which ſhould be ſecundum quantitatem delicti, and if it be otherwiſe, a Writ de moderata miſericordia lyes. Walmſly to the other point ſaid, ſometimes Pleas are held before the Suitors and the Bayliffs and Lord. But that is as I intend upon this difference: when a plea is held per breve it is coram Ballivo et ſectatoribus, but when without a Writ it is coram ſectatoribus only; And in a Court baron of Common Right pleas ſhall be held to the value of 40s. and to more by preſcription, and then it is a Court of Record, and if there be error it ſhall be redreſſ by a writ of error, and not by a Writ of falſe Judgement.

2. as to the ſecond exception taken by Yelverton, it was diſallowed by Walmeſly; For there is a difference between a diſtreſſe for ſervices, and a diſtreſſe for amerciaments, for not doing the ſervices: for the firſt is by Common right maynteynable, the ſecond againſt Common right by preſcription. And then for ſuch amerciaments you muſt diſtrain the tenants own beaſts, and not the beaſts of a ſtranger found upon the land, as for ſervices you may, And the reaſon of that as I conceive is, for that it is for a perſonal crime. And moreover he ſaid you may adde any thing to a Court baron by preſcription; as to ſell goods taken in execution upon a Judgement. Affirm'd now here, whereas otherwiſe it hath been held that you could not, And the rule of the Court was, that

if better cauſe were not ſhewen to the contrary, Judgement ſhould be entred for the Plaintiff.

Bateman *againſt* the Hundred of

An action upon the Statute of Hue and Cry.

STanton Bateman brought an action againſt the Hundred of in the County of Glouc. upon the Statute of Hue and Cry, and upon the generall iſſue pleaded, it was found by the verdict that he was robb'd, and that he took his oath before Mr. Seamer a Juſtice of peace, that he did not know the parties: and becauſe the Jury did not find moreover that the oath was . that he did not know the parties which robbed him, nor any of them, according to the letter of the Statute, It was mov'd that the Plaintiff ſhould not recover. Walmeſly was of opinion that it is well enough found, and ſufficient; for an oath ſhall be taken ſimply, and they need not obſerve that preciſe form as in pleading they ought. Warberton for the Defendant, and becauſe that the oath is not preciſe according to the Statute, it may be he ſwore in that manner upon ſubtiltie; For upon ſuch an uncertain depoſition, a man cannot be impeacht of perjury. Kingsmill likewiſe ſaid, that upon that default the action may well fail. Anderſon of the ſame opinion, for that the Statute is the ground of the action, the which ought to be obſerved. Walmeſly ſaid, when he ſhewed that 2 men did rob him, and that he did not know them, that amounts to as much by Common intendment, that he did not know any of them, then if it amounts to as much, it is ſufficient enough. Anderſ. If it be of the ſame ſenſe, ſee the Statute, but that it ſelf denotes a difference between the caſes, for it preſcribes that he ought to ſhew that he did not know them, or any of them. Walm. That's only proper where there were 3 or more that robb'd him, but where there are but 2, it is not apt nor proper ſpeaking to ſay, them, or any of them, but, or either of them. And in this caſe it may be it was the cunning of the Juſtice that examin'd him, who peradventure liv'd within the ſame Hundred that ſhould be charged, to eaſe himſelf & his neighbours. But if the oath was in another manner, and that can be prov'd, although the Juſtice certifies in another manner, yet the proof ſhall be allowed. To which Kingsmill agreed, and the Court urged the Defendants to give to the Plaintiff 40 s. and ſo to make an end, which motion both parties agreed to.

Bandals Caſe.

In Judicial acts the Sheriff cannot make a Deputy.

BAndal brought a Writ of Dower againſt her ſon, to be endowed of certain lands, which her Husband father of the tenant, dyed ſeiz'd of; The Writ iſſued to the Sheriff to enquire of the damages, and the Sheriff makes a warrant to one Wallis to take the enqueſt. Anderſon and Walmeſly were of opinion that the Law was not ſo, as, that he can make a Deputy in that caſe, becauſe it is a judicial act, the which the Sheriff ought to doe in perſon, and differs from that where they ſerve proceſſe as a ſervant.

AN action of Debt was brought upon an Obligation, the Condition of which was to perform all Covenants compriſed within certain Indentures, bearing even date with the Obligation (and in truth the Obligation and the Indenture were both without date) The Court ſaid, that they ought to have averr'd a date of the Obligation, and averr'd alſo, that the Indentures bore the ſame date with the Obligation.

Sir John Paſcall *againſt* Clark.

Intr. T. 15. Iac. C. B. rot. 2051.

IT was ſaid by the Court upon evidence, that if the Patron preſent one to the Advowſon, having taken an Obligation of the preſentee, that he ſhall reſign when the Obligee will after 3 months warning, that that is Simony within the 21 Eliz. cap. 16.

Harriſon *againſt* Maſſam.

IN Dower of lands in three Villages Allens Caſe was cited 14 Jac. Com. Pleas, that a ſummons and proclamation at the Church of one of them is good; And that the Summons muſt be 14 days before the return of the Writ. But in the Caſe between Gray and Rowland., that want of a ſummons in Dower is not error, but that otherwiſe no grand cape ſhall be awarded by the Statute 31 Eliz. cap. 3.

Spark *againſt* Richards.

Tr. 15 Jac. C. B. rot. 1968.

THe Sheriff upon a levari fac. levies 100 l. and before the return the Plaintiff receives the money, and made a releaſe to the Sheriff, & he returns that he hath levyed an hundred pounds. It was ſaid by the Court, that an action of debt upon ſuch a return lyes againſt the Sheriff. But in our caſe, he was diſcharged by pleading of the ſaid Releaſe. And ſo it was adjudg'd in London & in the Common pleas. A. delivers money to B. to pay it to C. for the debt of A. A. himſelf afterwards payd the debt, and afterwards B. pays the money to C. And it was ruld, that an action of debt lies againſt C. for the laſt money, for the laſt payment was upon a tacit. condit. if the debt was not payd before. ve. 1 E. 3. 2. a.

Parkinſon *againſt* Powell.

THe Plaintiff in an action upon the caſe brought in the County of Middleſex declares, that he had recover'd againſt one A. in an action of Debt, and had a cap. utlegat. and that he had delivered it to the Defendant being Sheriff, &c. and that the Defendant was often in the Company of the ſaid A. after, within his Bayliwick, and that yet he had return'd non eſt inventus. Judgement was given for the Plaintiff, and that the action is well brought in Middleſex where the Common Bench is, notwithſtanding that the ground of the offence was in Denbigh.

7 rep. 1 a.

Stone *againſt* Roberts.

M. 15. Jac. C. B. rot. 635.

AN action upon the Caſe was brought for words, thou art a witch and an inchanter; by the Court, the action does not lye, but otherwiſe it had been if he had added, and haſt bewitched I. S. &c. although that I. S. be not dead. For by that the Defendant manifeſted his intent to be of ſuch witchcraft which is puniſhable by 32 H 8. ca. 8. 1 Iac. 12. ſee the Caſe between Edwards and his wife againſt Oſely.

H. 4. Jac.

Thou art a witch, and Ile prove thee to be a witch, adjudged actionable.

Forteſcue *againſt* Iones.

LOrd and Tenant by fealtye and rent, the tenant at the day tenders the rent upon the Land, and afterwards the Lord, at an other day demands it, & diſtreyns, and adjudged good, and recovers damages in the

avowry: For the Rent was a thing in demand and not in render, as homage, There, that if the Lord one time refuſed he ſhould not diſtreyn untill he had demanded it of the perſon of the tenant, 21 E. 4, 7. 17 E. 44. and other books were cited, where a tender is not requiſite but to ſave the penalty. 16 H. 7. 14. 22 H. 6. 26. 17 Dyer. 29 Plowd 3. 70. 21 H. 6 A diſtreſſe judged to be tortious, by a tender at the ſame time the diſtreſs taken. A diſtreſs it ſelf is a ſufficient demand. 7 rep. 28.

Jenkins *againſt* Jenkins.

IN an action of waſte for cutting of trees the Defendant juſtifies, &c. that they were to make a Fence with pale, And by Hubbards, that it was good without ſhewing that the Fence was made of pale, &c. and now in decay. Note, where Hedge-boot, or Pale-boot are granted to be taken reaſonably, and where certain loads or trees are granted annually for that purpoſe, here it is not neceſſary to ſhew that the Fence is in decay. And note, that for Fireboot it is not neceſſary at the time of the cutting to ſhew the neceſsity, and ſo for reparation. For it is reaſon and good husbandry to cut them in ſome convenient time beforehand. And note the difference, becauſe that which is allowed certainly at ſome years may not be ſufficient.

Archbold *againſt* Cook.

IN a recordari fac. loquel. the caſe was thus, A. leaſes for years to B. but yet A. continues the poſſeſsion, and afterwards A. levies a fine with proclamations, &c. It was ſaid by Warberton, Winch, and Hutton, that that is no barr to the leſſee for his term, but only as a grant of a reverſion by A. See the record it ſelf, and the difference between that caſe and 5 rep. 123. T. 2 Iac. C. B. Mills againſt Bradley. That a Copy-hold Eſtate is not barr'd by fine and 5 years, & that the leſſee for years in futuro is not barr'd by ſuch a fine, but otherwiſe of a leſſee in poſſeſsion. *Mich. 15. Jac. 1. R. rot. 556.*

Waterer *againſt* Freeman.

FReeman had recovered in debt againſt Waterer, and had a fieri fac. and the Sheriff takes the goods, and returns that he could not have buyers, &c. and that yet F. knowing that, hath ſued another fi: fac. and F. upon that brought an action upon the Caſe, and the better opinion was that it was well, although that F. had ſued it in courſe. The 2 R. 3. 9. was urged to the contrary. But note, there it does not appear whether the ſute was determined or not, et res adhuc ſub Iudice, vc. 5 E. 4. 126. 4. rep. 18. and in the Kings Bench M. 43, 44. Eliz.

Brey againſt Partridge.

BY his Deed compounds for tithes, and after ſues for them in the Spiritual Court, by Popham and Gawdy, that an action upon the caſe lies. See 8 E. 4. 13 M. 4. Iac. The Lady Waterhouſe was ſued for the tithes of trees, whereof none were due, &c. there an action upon the caſe does not lye, for the perſon may well be ignorant of what things are due, otherwiſe where he ſues againſt his own knowledge. Sharplees Caſe in the exchequer was vouch'd. A having recovered in debt againſt B. in the common bench, and knowing that B. was reſident in Middleſex, cauſes him to be out-lawed in London, by proclamations there: and adjudged an acti-

on on the caſe lies. But at that time the firſt caſe was adjourned.

Record *againſt* Cornelius Jobſon.

SErjeant Harris argued that a Recogniſance taken in the Court of Admiralty to ſtand to the order of the Court is void, and that it hath been ſo adjudged. Warberton, That it is not a Court of Record.

Mountague *againſt* Clark.

AN Adminiſtrator is ſued in the ſpiritual Court to make an accompt, and a prohibition was denied: but otherwiſe if it had been to make a diviſion of the goods.

Steward *againſt* Biſhop.

IT was rul'd in the Court that an action upon the caſe does not lye, for ſaying S. was in Warwick Goal for ſtealing of Horſes, becauſe 'tis not an expreſs affirmation, that he had ſtolen horſes.

Crawlye *againſt* Kingsmill.

LOrd and tenant, the Lord avows the diſtreſs for fealty due from D. the tenant ſaid that D. was dead at the day of the taking the diſtreſs: by the Court a good Plea. But by Hubbard, if the Lord demand the fealty of D. and he refuſes and dies, yet the Lord may diſtreyn after his death for it.

NOte, by the courſe of the Common-Bench that a man might have a Dedimus Poteſtatem pro guardiano admittendo, where the infant is ſick and feeble.

Tooks Caſe.

A. had iſſue three Sonns, B. C. and D. B. and C. die leaving iſſue, and then A. dies inteſtate, having bona notabilia; the Commiſſary of the Superiour Ordinary commits the Adminiſtration to D. and D. is bound to him to make lawfull adminiſtration. D. is ſued in the ſpiritual Court to make a diviſion to the iſſue of B. and C. D. appeals to the Delegates who make a diviſion: and now D. moves a prohibition. Hubbard was clearly of opinion that the Delegates have exceeded their Commiſſion and Authority, for the Ordinary himſelf cannot do ſo. For the Statute 21 H. 8. makes an Adminiſtrator equal to an executor; And if the Delegates do to the contrary, a prohibition lies. Alſo they are not interpreters of a Statute. And that Statute 21. H. 8. that takes away the power of the Ordinary to diſpoſe the goods of the inteſtate, and the Ordinary now hath only power left to revoke the Adminiſtration. Alſo ſuch diſtribution of the Ordinary is not a good plea in an action of debt, &c. brought againſt the Adminiſtrator at Common-Law. Now by the Court a prohibition was granted, and that by the 21 H. 8. an adminiſtration ſhall not be committed to the Grand-children, if any Sonne of the party of the inteſtate be alive. Note P. 16 Iac. C. B. Lanch againſt Roſſe in a ſute in the ſpiritual Court to make a diviſion of the goods againſt an Adminiſtrator, a prohibition was granted: but otherwiſe for to render an accompt.

Winchcombe

Winchcombe *againſt* Pulleſton.

A. ſeiſed of a Mannor with an Advowſon appendant: S. comes to A. and promiſes that if he would preſent him, &c. after the death of the now incumbent, he would give him 70 l. to which he agreed. And upon that it was agreed between them that the next avoydance ſhall be granted to B. &c. the incumbent dies, B. preſents S. who continues incumbent from 27 Eliz. untill 7 King Iames. Then A. grants the Mannor cum pertinent. to Winchcombe in fee. S. the incumbent dies, 7 Iac. And the King preſents Pulleſton by the title of Simony: and Winchcombe brought a Quare impedit, and adjudged that it doth not lie, in which caſe 2 points were reſolved.

1. That that is Simony. (1) Becauſe there was a corrupt contract for the advowſon: Note, that in the Stat 31 Eliz. there is no word of Simony; for by that means then the common-Law would have been Iudge, what ſhould have been Simony and what not. (2) Although that the prochein avoydance might be bought and ſold bona fide, without Simony, yet it was ſo granted to B. to perform the corrupt contract, 2 Iac. was vouch't, that if the Father purchaſ't the prochein avoydance, and preſents his Sonne after the death of the incumbent, that is not Simony, nda that it was accordingly judged in 2 and 43 Eliz. It was Smith and Shelbornes caſe. But by Hubbard, that if in the grant of the prochein avoydance it appears that it was to the intent to preſent his Son or his Kinſman, and it was done accordingly, that is Simony. In the 7 Iac. in the Exchequer Calvert againſt Parkinſon. The Cozen of C. being Clark, comes to the Grantee of the prochein avoydance, and promiſes him twenty pound, and twenty pound per annum if he will preſent C. to the Church quando, &c. C. (not knowing any thing of the contract) is preſented accordingly: that is Simony. a fortiore in our caſe where S. himſelf who was to be preſented, was partye to the firſt motion of the contract for preſentation,

2. It was reſolv'd, that the death of the Simoniacall Incumbent does not hinder but that the King may well preſent, for the Church was never full as to the King, & that turn is preſerv'd to the King by force of the Statute. Yet it ſeems that the Church is ſo ful that an eſtranger may not preſent for uſurpation. For it is not like 7 Rep. 28. Where the King is to preſent by lapſe. And there were many caſes put, as that the Church may be full or void in effect when there is a Simoniacal incumbent. Hubbard ſaid, that if A. be oblig'd to preſent B. &c. and he preſents by Simony, yet the obligation is forfeited; And he put this caſe. That if the Executor pays a debt upon an uſurious contract, that is a Deveſtavit if the Executor had notice of the uſury. And ſo likewiſe, that the rightfull Patron may have a quare impedit after the ſix months againſt the incumbent of an uſurper, that is in by Simony. And by the Court, to ſay the Church was full for ſix months, is no Plea, when he is in by Simony. Warberton and Hutton cited Doctor Hutchinſons Caſe 10 Eliz. Parſon preſers his bill for Tithes, the Pariſhioner pleads that he was preſented by corruption, &c. and by Simony, and a prohibition was granted notwithſtanding that the Parſon pleaded pardon of the Simony by the King, and it ſeem'd that it was now tryable by the common-Law. Note 7 H. 7. 37. and M. 40. and 41 Eliz. Gregory againſt Ouldham. In debt upon an Obligation to perform certain covenants, which in truth were upon Simoniacall contracts, and the Plaintiff recovered, for it was ſaid that that Obligation is collateral, and the law does not at all look upon or take notice of the Simony eo nomine; for it is not once nam'd in the Statute, but only corrupt giving, &c.

Smith *againſt* Stafford.

H. 15. Jac. C. B. rot. 906.

IN an aſſumpſit the caſe was thus, A. promiſes to his wife, that if ſhe would marry he would leave her worth 100 l. they intermarry, &c. And now Serjeant Altham mov'd in arreſt of Judgement, becauſe the aſſumpſit is a perſonal thing, and extinguiſht by their intermarriage. But Judgement ready to be given for the Plaintiff it was compounded in Court. And note the reaſon why the intermarriage did not extinguiſh that promiſe and aſſumpſit, becauſe it was to have its eſſence upon the contingency (viz.) that if the wife ſurviv'd, for it was not a certain promiſe for any duty, nor in eſſe during the coverture, and for that it could not be ſuſpended nor extinguiſhed by the intermarriage. But by Warberton Juſtice, that if A. be bound to a feme ſole to pay to her 10 l. after his death, and after marries her, the Obligation is extinguiſh'd, which the Court granted. And the caſe of Belcher *againſt* Hudſon in H. 6. Eliz. B. R. rot. 132. was cyted. A. ſaid to a feme ſole, marry my friend W. and if you over-live him I will give you 100 l. they intermarry, and the Husband releaſes to A. all demands, and dyes, the wife brings an aſſumpſit, or an action of debt upon that; And adjudged that ſhe ſhall not be barr'd by that releaſe. Serjeant Altham ſaid, that the reaſon of that caſe was, becauſe during the life of the Husband it was not a thing in demand; But it might well be releaſed by apt and ſpecial words, although that it was to take effect by contingency in futuro. And ſo Juſtice Winch alſo thought.

Sendall *againſt* Sendall.

IN an action of Treſpaſſe, and a new aſsignment made, &c. The iſſue is found for the Plaintiff, and the Writ of enquiry of damages was General without any mention of the new aſsignment. And yet 'twas rul'd by the Court that Judgement ſhall be entred for the Plaintiff, although that the Clarks ſay in ordinary courſe 'tis otherwiſe; And with that Judgement agreed the caſe of Pullen and Eaſon, H. 43. Eliz. B. R. rot. 941. For the new aſsignment is not the Declaration of the certainty of accompt,

Ford *againſt* Mead:

M. 15. Jac. C. B. rot. 725.

A. recovers the arrerages of rent againſt B. at a niſi prius; but before the day in Bank A. releaſes to B. all demands: By Hubbard, That if it had been in the caſe of the King, the Defendant at the day of Bank might have pleaded that, for he cannot have an Audita Querela againſt the King. But otherwiſe in caſe of a Common perſon.

NOte, that it was allowed for a principal challenge, that the Defendant was indebted to the Juror. Sed quære in E. 5. if it been't è converſo.

IT was ſaid by the Court, that in pleading of a leaſe for years, a man need not ſay by force of which he entred, &c. 11 rep. 52. of a leaſe for life 8 rep. 82. b. yet note, it there been't a difference when the leaſe is to commence in futuro. Dyer 189 a.

Coo:

Cooper *againſt* Illes.

The Bayliſ of a liberty makes an execution of a ſcire fac. within his liberty, and takes his Fee by the Statute of 28 Eliz. and the Sheriff of the County takes alſo his fee; And that it hath been ſo uſed in that place. But by the Court it is not good; But that the Bayly ought to have his fee only. For ſee P. 1. Iac. B. R. rot. 445. Gardner *againſt* Harriſon. Where the eſcape was brought againſt the Bayly of the Franchiſe. ve. Dyer 278.

Pigg *againſt* Caley.

P. brought an action of Treſpaſſe againſt C. for taking his Horſe, &c. C. ſaid that he is ſeiſ'd of the Mannor of D. to which P. is a villein regardant. And that he and all thoſe, &c. have been ſeis'd of the Plaintiff and his Anceſtors; The Plaintiff ſaid, that he is free, &c. abſque hoc, that the Defendant, &c. were ſeis'd of the Plaintiff &c. as of Villein regardant, and the iſſue is found for the Plaintiff. And upon motion in arreſt of Judgement it is rul'd that the traverſe is well taken. Note Dyer 283. accordingly. And by Hubbard if a man hath not ſeiſin of a Villein in groſſe within 6 years, he ſhall be barr'd by 32 H. 8. of limitation, in nativo habendo, for liberty is favour'd; But yet of a Villein regardant, the ſeiſin of the Mannor to whom, &c. is ſufficient ſeiſin of the Villein. *H. 15. Jac. C. B. rot. 1966.*

NOte, it was ſaid by Hubbard chief Juſtice, and Winch, but Warberton was of the contrary; That if a man hath a licenſe of foreſtalling, upon the 5. E. 6. he need but only recite the Statute 5 E. 6. in his pleadings, without pleading 13 Eliz. for the licenſe is grounded only upon 5 E. 6 and the 13 Eliz. only qualifies the perſon.

NOte, that in the argument of a caſe at barre, Leonards Caſe P. 29. Eliz. was vouch't. Leaſe for years grants to the Leſſee by parol, to enfeoff, grant, bargain, ſell and confirm to the Leſſee, in fee, with a Letter of Attorney in the ſame deed to make livery and ſeiſin; The deed was delivered to the Leſſee, but no livery and ſeiſin was made. And adjudg'd that the reverſion does not paſſe: for the intent of the Leſſor appears to paſſe that by livery and ſeiſin. ve. Dyer 269. 145.

Cox *againſt* Dawſon.

COppyholder for life becomes lunatick, and A. his Cozen ſowes his land, after the Lord grants the cuſtody of the lunatick to B. A. takes the Corn to the uſe of the Lunatick, and B. brought an action of Trover and converſion in his own name. It was ſaid by the Court, that it was ill brought, for he ought to have brought it in the name of the Lunatick. *H. 13 Iac. C. B. rot. 519.*

2. The ſecond opinion of the Court was, that as this caſe ſtood, neither the Lord nor the Committee have any thing to do to meddle with the corn. For this reaſon, and Mr. Brownl. ſaid it had been lately adjudged in this Court, That a quare impedit ought to have been brought in the name of the Lunatick. ve. Dyer 302.

Ford *againſt* Weedham.

M. 15. *Jac. C. B. rot.* 725.

IN an action of treſpaſs the Plaintiff makes this title to himſelf, That I.S. was ſeiſed of that Land, &c. and being ſo ſeiſed, &c. 10th. of February, &c. was attainted of Felony before A.B.C. and D. Commiſsioners, by force of a Commiſsion awarded to them and others, and upon the motion in arreſt of Judgement, It was rul'd by the Court, that it was not well pleaded. For there it (was as it is pleaded) a joint authority to all the names in the Commiſsion. But if he had pleaded that I. S. was attainted by force of a Commiſsion awarded to A. B. and others, that had been good, by Hubbard and Winch.

The ſurmiſe was to have a prohibition. That the Inhabitants of D. of which he is an Inhabitant, have paid un. mod. decimand &c. And they were at iſſue, and he prov'd only that he himſelf had payd it, and yet well. And no conſultation; For every particular is included in the general and prov'd by it. And it appears ſufficient matter for a prohibition, and to ouſt a ſpiritual Court of their conuſance.

2 Agreed that where the Statute appoints proof of the ſurmiſe to be by two, it is ſufficient if two affirm that they have known it to be ſo, or that the Common fame is ſo.

Sparrow *againſt* Norfolk.

B. Adminiſtrator of A. makes C. his Executor and dies, C. is ſued in the ſpiritual Court to make an accompt of the goods of A. the firſt inteſtate: and C. now moves for a prohibition, and had it, for an Executor ſhall not be compell'd to an accompt. Note the Statute 21 H. 8. gives power to the Ordinary but not for accompts; But an Adminiſtrator ſhall be compell'd to accompt before the Ordinary.

Coopers Caſe.

The Sheriff makes an execution of an 100 l. 46 s. 8 d. and now moves that he ſhall have but 6 d. per pound. for his fee, according to the Stat. 28 Eliz. which gives 6 d. in the pound for all above 100 l. yet becauſe the 46 s. 8 d. is ſo little above 100 l. the Court awarded that he ſhall have 3 l. 6 s. 8 d. for his fee.

Green *againſt* Dinkenſon.

M. 16 *Jac. C. B. rot.* 541.

IT was ſaid by all the Prothonotaries, that the Defendant in accompt, upon the firſt writ, ſhall not be held to put in bayle to the action, yet in ſpecial caſes by the diſcretion of the Court, he ſhall find bayle, and ſo there are preſidents.

Upon a ſurmiſe by a Pariſhioner, that he had compounded with the Parſon for his tithes for one year, and it may be without deed; By Brownlowe that a prohibition ſhall be awarded, and that there are divers preſidents in this Court. But otherwiſe if it be for more years, 'tis not good without Deed.

Rennington

Rennington *againſt* Cole.

VPon evidence admitted by the Court to be a good Cuſtome, that an Executor or Adminiſtrator ſhall have a year in the land of a Copyholder againſt the wife that claims her Frankbanck or durante viduitate. The principal caſe as it was argued in T. 16 Jac. was. Copyholder for life (where there is a Cuſtome that the wife ſhall hold durante viduitate) takes A. to wife (being daughter of the Siſter of the Father of the ſaid Copyholder) Co. Litt. 235. that it is not a cauſe of divorce. They have iſſue, the Husband dyes; the wife prays to be admitted to the Copyhold, the Lord refuſes, the wife enters, and the Lord ouſts her, ſhe re-enters, and leaſes for a year, and that Leſſee being ouſted brought an Ejectione firm. And adjudg'd that it well lies. *H. 15. Jac. C. B. rot. 362.*

1. Although, that marriage be within the Leviticall Decrees, yet it is a marriage de facto, and only avoidable by divorce, that now after the death of the Husband it cannot be done, for by that the iſſue ſhall be baſtardized; And that if the wife had been inheritrix, &c. the Husband ſhould have been tenant by the Courteſie. 7 H. 4. was vouch. A gift in tail to the Brother and Siſter are ſeveral Eſtates. And by Hubbard that it ought to appear in the very deed of the gift, that it is brother and ſiſter, otherwiſe it is a Joint taple, and the iſſue ſhall inherit and hold a formedon. 8 rep. 87. 17 E. 3. 51. 18 E. 3. 39. 9 H. 6. 39. 22 E. 4. 18 E. 4. 29.

2. That that leaſe of the Wife where ſuch a cuſtome, is good before admittance, eſpecially as our caſe is (1.) Becauſe ſhe had pray'd to be admitted, and no default is aſsign'd to be in the wife. (2.) Becauſe in that caſe no fine is due to the Lord, and ſo no prejudice to the Lord. For in that caſe it was ſaid by the Court, there needs no admittance. For by Hubbard that Eſtate durante viduitate, is but a branch of the eſtate of the Husband, and the Admiſsion of the Husband ſuffices for the eſtate of the Wife, and the eſtate of the Husband was big with the eſtate of the wife, Which was to be brought forth by the death of the Husband. And that caſe is more ſtrange which is the caſe of an heir of Copyholder, which ought to pay a *Fine* for admittance, and yet before admittance he may bring an action of Treſpaſſe.

Brand *againſt* Todd.

NOte the difference agreed by the Court. If the King grants to A. all the waſte in D. after an ad quod damnum return'd, and that the waſte conteins 120 acres, yet if it contain 300 acres, all paſſe: for the grant is general, and the ad quod damnum was to enquire of the damages, and not for the quantity of the waſte. But if the King grants 120 acres of his waſte in D. and the ad quod damnum returns, that it is not to his damage, and that the waſte conteins 300 acres, there nothing paſſes, for it is uncertain which 120 acres were intended, and the party ſhall not have any Election againſt the King. All which was agreed upon evidence to the Jury.

Lord Rich *againſt* Makepeace.

LEſſee for years, the trees being excepted, as liberty to take the ſhrowes and loppings for fireboot; If he cut any tree it ſhall be as well for the loppings as for the body of the tree. By Hubbard and the whole Court, without queſtion.

Liſter *againſt* Crameel.

IN a quare impedit. The Incumbent pleads that before the action brought he had been in by the ſpace of 6 moneths, &c. of the preſentment of S. S. in the Church. This difference was taken by Serjeant Henden, and agreed by the Court. When the Incumbent pleads the preſentment of a ſtranger, there he ought to ſhew, that the ſtranger had a title, and that he was ſeis'd of the Advowſon, &c. or that he was ſeis'd of a Mannor, to which, &c. But where he pleads that he was in for 6 months of the preſentment of the Plaintiff himſelf, or by collation by lapſe by the Ordinary, there he need not make any title, 10 E. 4. 11.

Cole *againſt* Foxman.

IN an action upon the caſe by a Commoner againſt I. S. for charging of the Common, See 9 rep. 112. The poynt was, A. ſeis'd of 5 acres and of a Common appurtenant to them, aliens one acre, if the Common be extinct, for part or in the whole. And by the Court it is not extinct for any part, but it ſhall be apportioned, and no prejudice to the terre-tenant. And Hubbard chief Juſtice, who gave the rule ſaid, the ſole reaſon is, that otherwiſe a grand inconvenience and miſchief would enſue. For by that all Commons in England ſhall be extinct, and ſalus populi eſt 8 rep. 79. ſumma lex, & apices Juris non ſunt Jura. And the great diſpute in that caſe was, for the certainty what ſhall be ſaid to be cattel levant and couchant. And Serjeant Attee ſaid, that Cook chief Juſtice in his circuit in Norff. ſaid, that ſoe many of the cattel that the land, to which the Common is apurtenant, may maintain in the Winter, ſo many ſhall be ſaid levant and couchant. To which Warberton and Hutton agreed.

Skinners Caſe.

A Surmiſe to have a prohibition, if it be proov'd before one of the Judges within the 6 months, although that it be not recorded till after the 6 months, yet tis well enough. And ſo rul'd by the Court. And good alſo, although that the proof be in the vacation. P. 43. Eliz. B. R. Pottinger *againſt* Johnſon.

Wolſe *againſt* Hayton.

A. makes B. his Executor and dies, and in an action of debt againſt C. as Executor of an Executor, C. pleads that he had renounced the Executorſhip of B. and it now being mov'd at Court, it was rul'd, that he ought to be Executor to both or none. For by Hubbard, Quod Lex conjunxit nemo ſeparet.

Pinder *againſt* Spencer.

PArſon prefers his bill for tithes of Haſle, Hollye, Willowe, Whitethorne, &c. a prohibition was mov'd, becauſe they were of 21 years growth, and more. And by the Common cuſtome in Hampſh. they were us'd for timber to build and repair their plowes, and cited P. 14. Jac. C. B. rot. 1918. Cuffyes caſe againſt the Parſon, For Hollye, Willows and Maple, and a prohibition was awarded. And Hubbard ſaid, in Cumberland Beech was us'd for timber, and the uſe of the Country, for ſcarcity of other trees will alter the caſe.

Dr.

Doctor Brigmans Case.

The Parson libells for tithes of hay, &c. The Parson said that the custome of the Parish hath been, that he that hath corn within the Parish ought to reap the corn, and also the tithes of the Parson, and to make them into cocks, and to preserve them untill the Parson shall carry them away. And a prohibition was granted; For although that the Parishioners ought de jure, to reap the corn as it was agreed T. 28 Eliz. B.R. yet he is not bound to guard the tithes of the Parson, &c. but if the Parson does not carry them away in convenient time an action on the Case lies against him. P. 20 Iac. B.R. rot. 286. there such an action was brought by Wiseman against the Rector of Landen in Essex for not accepting, &c. of the tithes of Chæse.

Livesly *against* Glasbrook.

Intr. P. 16. Jac. C. B. rot. 2313.

By Hubbard Chief Justice, and Warberton. That if the parties are at issue upon not guiltye in Battery; As that Case was, that the Defendant relict. verification. cannot confess the action without consent of the Plaintiff, for although it be intended to be for his benefit, yet he ought to pay for the entry of the confession, and perhaps too the record is made ready for the tryall, at a nisi prius. But Winch and Hutton to the contrary. For the intent of the Law is to punish the guilty; And when the action is confess'd the Plaintiff may have Judgement, and it shall be as beneficial to him, as if he had had Judgement upon a verdict. But Winch agreed that at a nisi prius the Defendant cannot confess the action. By Hubbard that it is the practice to this day. And Warberton said, that when an action is brought for a thing certain, as debt, &c. there the Defendant may confess without the assent of the Plaintiff; But otherwise, if it be for a thing uncertain, as trespass or battery. Walter the Prothonatory said, that before now such a confession was refused, because the Record was seal'd, and that such a confession was accepted in the Kings Bench; But yet is was rul'd that the Confession shall not be accepted because it appears to be a grand battery, and misdemeanour.

8 Rep. 59. 60.

Butt's Case.

Moore Serjeant mov'd at Court for a prohibition, because where the custome of the village was, that the Parishioners have used to elect two Churchwarden; and at the end of the year, to discharge one and elect another in his room, and so alternis vicibus &c. by the new Canon now the Parson hath the election of one, and the Parish of the other. And that he that was elected by the Parishioners, was discharged by the Ordinary at his visitation. And for that he prayd a prohibition. et allocat. as a thing usuall and of course. For otherwise, (by Hubbard) the Parson might have all the authority of his Church and Parish.

Sir Henry Lindeleves Case.

It was said by the Court, that a man needs not have a writ of allowance upon pardon for treason, but otherwise of felony, ve. 7 E. 3. 248. 3 Assize 15. Note, that he comes in without process.

Basset

Baſſet *againſt* Baynard.

Intr. p. 48. *Eliz. B.R. rot.* 483. 8 E. 3. 55.

A. ſells one hundred load of Wood, of his trees, to B. to be taken at the aſſignment of the Bargainor, and after A. ſells one hundred load to C. to to be taken at his pleaſure; B. aſsigns his intereſt to D. the Vendor aſſigns, &c. C. takes them away, and D. recover'd in an action of trover.

Gray *againſt* Champeine.

G. Recovers by verdict, in an ejectione firm. and it was moved in arreſt of Judgement, That the Count was of a Leaſe of ten acres of Land, by the name of all his Lands and Tenements in Shoram in Kent, and Judgement was ſtayed, becauſe there is no place where the ten acres of Land are: and that after the per nomen it is not ſufficient. ve. Tr. 33 Eliz. B.R. Sewers Caſe; upon a grand debate the indictment was held inſufficient, becauſe no place is put, untill after the al. dict. &c.

NOte, in the argument of a Caſe, Tr. 38 Eliz. B. R. rot. 336 Leeds againſt Crompton was vouch'd, The Lord Stafford leaſes land to three, Provided that they nor any of them ſhall alien the premiſſes without licence of the leſſor; the licences one of them to alien his part, and after the other two alien without licence. And the entry of the Leſſor is there adjudged not lawfull, becauſe the Condition was intire. 4 H. 7. 9. the very Caſe is there put. Sed quære if they had made partition by conſent before that Licence.

4 rep. 120.

Spark *againſt* Spark, T. 43 Eliz.

Intr. 43 *Eliz. B.R. rot* 503

LEſſee for years aſsigns a part, &c. rendring Rent, and dies, and his executor for the Rent arrear after the death of the Teſtator brought an action of debt, in the detinet only. That it was well brought. ve. 19. H. 8. 8. 11 H. 6. 36. 20 H. 6. 4.

A Parſon brought an action of debt upon the Statute of 2 E. 6. cap. 13. againſt Spurr, for that that he had not divided the tithes according to the Statute; Afterwards the Plaintiff after appearance is non-ſuted. If he ſhall have coſts by the Statute, 23 H. 8. cap. 15. was the queſtion. Upon that Statute it ſeem'd to King and Walmſly (being only preſent,) to be clear, that it was out of theſe words in the Statute (viz.) or any action, bill, or plaint of Debt or Covenant, upon any ſpecialty made to the Plaintiff or Plaintiffs. For that there ought to be upon a contract, to which the Plaintiff was party. But the doubt depended upon the ſubſequent (ſcil:) or any Statute for any offence or wrong perſonall immediate ſuppoſed to be done to the Plaintiff or Plaintiffs, &c. Walmſly. The Statute of 23 H. 8. will, that if any action be brought upon any ſtatute for any offence or wrong, &c. and alſo the action is not brought for the offence but for debt which is not any offence, then 'tis out of the words of the Statute, King. But the action of the debt is by reaſon of the offence. Walm. The debt is the penalty for the offence, and the penalty upon that are ſeveral diſtinct things. Sed Adjournatur.

Wil-

Wilkins *againſt* the Maior of Lincoln.

WIlkins a Baker of the City of Lincoln, brought an action of treſpaſs againſt the Maior of the ſame City, for taking certain loaves of Bread. The Defendant ſaid the City of Lincoln eſt antiqua Civitas, &c. and that the cuſtome is, and that it hath been within the ſame City, time out of, &c. That if any Baker within the ſame City, bake any Bread, and offer to ſell it within the ſame City, and that the Maior for the time being, hath uſed to weigh it, and if it be found not weight, that then he hath uſed to diſtribute it to the poor of the ſame City. And ſhew'd how that he was Maior, &c. and upon that it was demurr'd.

Gibbons *againſt* White.

GIbbons brought an action of debt againſt White upon an obligation, in which White was oblig'd to G. being Sheriff, by the name of Sheriff, upon condition to appear perſonally before the Juſtices of the Bench ſuch a day. The Defendant pleads the Statute, &c. And the Statute is that the Condition of the obligation ſhould be, that he appear at a day, and not that he appear perſonally at a day, and upon that it was demurred.

Bradford *againſt* Laſſels.

IN an Ejectione firm. the caſe was thus. A man ſeiſed in Fee conveys his Land to the uſe of himſelf for life, and to his daughters that ſhall be unmarried at the time of his death, untill every one of them ſhall and may leavy 500 l. Firſt unto the eldeſt daughter untill ſhe hath levyed 500 l. then to the ſecond, ſo to the third, &c. The Father dies, the Sonne enters and continues poſſeſſion for a certain time, and will not ſuffer the eldeſt Siſter to take the profits: If ſhe may now enter and take the profits untill ſhe hath levyed 500 l. or if there ſhall be a defalcation for the time that the ſonne continued poſſeſſion, was the queſtion. Walmſly ſeem'd that ſhe ſhall have her remedy againſt the Sonne, for the time that he hath continued poſſeſſion; and not to begin now to levy the 500 l. in prejudice of the other Siſters. For it was her folly to ſuffer the Sonne to continue poſſeſſion.

Dottin *againſt* Ford.

DOttin brought an action on the caſe againſt Ford for theſe words, thou art a beggerly Knave, and a bankrupt, and art not able to ſhew thy Face, and it was mov'd by Serjeant Herle in arreſt of judgement, that the action will not lye, if he doth not allege in his Declaration, that he was a Merchant at the ſame time. Walmſly ſaid. If a man calls an Officer or a Juſtice of Peace a Briber, he ought to allege that he was an Officer at the time when the words were ſpoken. But here it was proved by divers circumſtances conteined in the Declaration, that he was a Merchant at the ſame time, although that it be not expreſly ſhewed. King: It may be that a man may Merchandize at that time, and yet if ſuch words were ſpoken to him an action upon the Caſe ſhall not be maintayn'd; As if he be an Apprentice to a Merchant, and although that he merchandizes for another man, during his Apprentiſhip, yet ſuch words are not to his diſcredit, when hee's out of his time; and a Mer-

chant for himſelf. And now a man may exerciſe merchandizing, and after relinquiſh it for a time, and afterwards exerciſe again: if a man calls ſuch a man Bankrupt, an action upon the caſe lies. Herle. If a Merchant relinquiſh his trade to live in the Country, in the nature of a Gentleman or of a Farmer, If a man calls ſuch a man Bankrupt, an action upon the caſe does not lie; But if afterwards he exerciſes that again, and then is called Bankrupt, an action upon the caſe lies. And ſo he held the diverſity.

A Man cannot traverſe that which is not alleg'd

AN action of debt was brought upon an obligation bearing date the 10th. day of June, Anno 29 Eliz. and delivered the 18th. day of the ſame moneth, in the ſame year. The Defendant pleaded that he made the ſaid Deed the ſaid 10th. day of June, and then delivered it, at which time he was within age, and that he did not come to full age until the 27 day of the ſame moneth, Abſque hoc quod deliveravit, &c. after which he came to full age. And it was mov'd by Harris, that the Plea was not good, becauſe that that is a traverſe, to that which is not alleg'd (ſcil.) the full age; but only if it were delivered the 18 day or not, that was only traverſable. Warberton, The plea is good enough; For the day of the delivery is not material, but if at the ſame time he was within age, or of full age; And it may be the Defendant did not come to full age of a month after the 18 day. Wherefore for us to be bound to a day certain would be inconvenient. And upon that vouch'd 8 H. 6. 6. where the confirmation of patron and ordinary, which bore date before the grant of the Parſon, was pleaded, Prim. deliberat. 4 days after the grant of the Parſon; and the Defendant pleaded that it was delivered the day that it bore date. Abſque hoc that it was delivered after the grant; by which, &c. Walmſ. That the ſaid book is expreſſe in the poynt. And ſee 14 H. 8. 17. Wheelers caſe. So all the matter is, if he was within age or at full age at the time. Anderſon, You may by proteſtation. That it was delivered the 18 day, abſque hoc that he was of full age at the time. And to that the Court agreed. Wherefore it was ſo pleaded.

Wilde *againſt* Cookeman.

IN an action upon the caſe for ſlander, in hæc verba, thou waſt for-ſworn in the Leet at Beaſton, The Leet of ſuch a one, &c. held 14 Apr. The Defendant ſaid, that the Plaintiff being ſworn before the Steward of a Leet to make preſentments, &c. with another. And they preſent, that ſuch a ditch not being ſcowr'd ad nocumentum, &c. which was falſe, and ſo he juſtified: Adjudg'd for the Plaintiff. For there the Juſtification is, that the Plaintiff made a falſe preſentment, in ſaying that ſuch a ditch was not ſcowr'd, and does not ſay that the ditch being infra Juriſdictionem Curiæ Letæ, &c. and then a falſe preſentment of a thing out of the Juriſdiction of the Court is not perjury.

2. The Juſtification conteins only a falſe preſentment made by the Plaintiff, which may be true, and yet no perjury committed. For it may be that evidence was given to the preſentors ſufficient to induce them to find it. But if the Juſtification had been that they, ex notitia illorum propria, made the preſentment, then otherwiſe. Gaudee and Fenner. It ſhall be ſo intended. Popham on the contrary. For perjury is an odious thing, and the Juſtification of that ſhall not be taken by Intendment. But note, the principal cauſe of Judgement was upon the firſt reaſon.

Perkins

Perkins *against* Wilde.

PArſon makes a leaſe for years of parcel of his gleab land, of the value of 13 l. per annum, rendring 13 s. rent. Adjudg'd that the Leſſee ſhall pay the tenths to the Leſſor, notwithſtanding his own Leaſe, and the reſervation of the rent; But there otherwiſe it had been, if it had been a rack rent to the value of the land. Sed quære of that diverſity. *M.* 31. 32. *Eliz.*

Bladwell *against* Edwards.

B. makes a Feoffment to the uſe of himſelf for life, after to the uſe of ſuch iſſue or iſſues, of the body of Mary Floyd, from eldeſt to eldeſt, as were reputed to be begotten by the ſaid Bladwell, whether he be lawfull or unlawfull. And in that caſe by all but Popham, that that is a good remainder limitted to a Baſtard. For a ſon in reputation ſuffices to make him a purchaſer, as 'twas held 14 Eliz. Dy. 313. And although that in 22 of Eliz. it is held, that a man cannot by way of Covenant raiſe an uſe to his baſtard, yet by way of limitation of an uſe upon a feoffment 'tis otherwiſe. And although Littleton ſays, that a baſtard eſt nullius filius. *A vem limitted to a Baſtard.*

1. Firſt, that is only as to the inheriting any man.

2. That is intended, that he had not any father, but without queſtion he had a mother, and ſo ſhall be term'd in law, the iſſue of his mother; And the law does not regard, if the iſſue be lawfull or not in a purchaſe.

A Baſtard eſt filius nullius patris in law, but in reputation otherwiſe it may be. As the Caſe was alſo noted by Cook. If A. had iſſue 3 ſons, and the eldeſt is a baſtard, and a remainder alſo is limitted to the eldeſt iſſue of A. The ſecond ſon that is a mulier ſhall take, and not the baſtard. For in general words the conſtruction ſhall be in digniori ſenſu; but if the words are ſpecial, as in this caſe, otherwiſe it is, for modus et conventio vincunt legem. And he cited Plowden, who often ſays that a woman may give lands in Franck marriage with her baſtard.

Holman *against* Collins.

ERror was brought upon a Judgement given in the Court of Plymouth in Devon. *M.* 37. 38. *Eliz. rot.* 2171.

1. For that the ſtile of the Court was Curia Dominæ Reg. tent. cor. Maiore de Plymouth, without ſaying, ſecundum conſuet. Villæ. And that was held error; For he that is the Judge of the Court, ought to be by Patent or Preſcription. And becauſe that the Court there hath been held time out of mind, &c. the omitting of thoſe words ſecund. conſuet. was error.

2. The ſecond error was, becauſe that no day was preſix'd to the Defendant that he ſhould appear, but generally, ad proximam Curiam. And for all that it was alleg'd that the Court was held there every Monday, and ſo enough certainty. Yet that alſo was held error; And ſo upon both the firſt Judgement was revers'd.

Mercer *against* Sparks.

IN an action upon the caſe for ſlander, and upon that error was brought. Becauſe it was not expreſt in the Declaration, quod malitioſe dixit thoſe words. And adjudg'd that that is no error. For the words themſelves *Hill.* 38. *Eliz. rot.* 948. *C. B.*

ſelves are malicious and ſlanderous, ſo Judgement affirm'd.

Kirton *againſt* Williams and others.

Y. 38. Eliz. rot. 623.

IN an appeal of Mayme againſt 3. The one pleads null. teil in rerum natura, and pleads further quoad feloniam guilty. The other pleads miſnoſmer, and quoad feloniam not guilty. The 3 pleads not guilty. The Plaintiff demurrs upon the pleas of the two firſt; and adjudged clearly that the plea is naught. For although a man be charg'd with felony, yet that is in favorem vitæ; But in that appeal of maym, being but a Treſpaſſe without any jeopardy of life, as 40 Aſſ. 9. 40; 41 E. 3. the reaſon is given, and ſo it ſhall be otherwiſe.

Adams *againſt* Dixie.

Conſideration to raiſe an aſſumpſit.

B. being arreſted for debt at the ſute of A. puts in R. his ſpecial bayl, after Judgement was given againſt B. And for that, that B. neither paid the debt, nor rendred himſelf, A. brought a ſcire fac. againſt R. R. hearing of that comes to A. and ſaid, that in conſideration that A. would aſſign over the debt of B. to him, and deliver to him the obligation of B. that he would pay the debt. A. promiſed to aſsign the debt, R. pays the mony; And becauſe that A. would not aſsign the debt, he brought his action againſt him, and maintainably, and that the conſideration was good. Yet it was ſaid by the other party, that by the Judgement and default of B. it became the debt of R. and then when R. pays it, which he ought by the law, that will not amount to raiſe a Conſideration. Aſſ. 9. E. 4. 19. delivery of his proper evidences is not a ſatisfaction for the Treſpaſſe. Sed non allocatur.

Browne *againſt* Michel.

Tr. 37. Eliz. rot. 661. C. B.

AN action upon the caſe for theſe words Mr. Browne hath delivered untruths upon his Oath in anſwer to I. S. Bill in the Chancery. And adjudg'd for the Plaintiff. But by a Writ of error in the Kings Bench the Judgement was reverſed, and that the words are not actionable, becauſe that he did not ſay he delivered untruths in matter of ſubſtance, and in Chancery there are many frivolous diſcourſes in matter of form.

IT was adjudg'd, that as an Executor may releaſe a debt, ſo he may give an Obligation, which is the Inſtrument of the debt. So 2 Joynt-leſſees of a term by Indenture, and the one gives the Indenture to a ſtranger and dies; All the entire term ſurvives to the other, yet he ſhall not have an action for the Indenture.

Loyd *againſt* Twyford.

Intr. M. 42. 43. Eliz. B. R. rot 528.

IUdgement was given in debt in the Common Bench upon a non ſum informatus, and error was brought and mov'd for error.

1. Becauſe there is no imparlance.

2. Becauſe the Entry was quod defendit vim et injuriam; when it is not uſual that ſuch a Judgement ſhall be given upon a non ſum informatus. Yet notwithſtanding that Judgement was affirm'd. And like wiſe P. 43. Eliz. B. R. rot. 592. Eſſex againſt Meredith.

Hick.

Hickmans Case.

IN a quo Warranto he claims to have toll in ſpecie of grain expoſed to ſale, whether they be ſold or not, ratione Manerii. Adjudg'd to be ill, becauſe it ought to have been ratione Mercati; Alſo he cannot have toll if the thing be ſold. Dyer 227, 228. Note 20. H. 7. The party hath no remedy for his toll if the goods be carried out of his Juriſdiction. ve. 30. E. 3. 20. That a diſtreſſe is incident to every toll. But in the caſe of Northampton adjudg'd that toll is not incident to a Market, if it be not ſpecially granted. Alſo he cannot have toll in kind, (viz.) part of the thing it ſelf. 30. E. 3. 15. Br. 299. and Avowrye 129. But note, 6. H. 6. 46. Stallage may be claim'd by reaſon of the ſoyle. *Intr.* 41. *Eliz.* B. R. rot. Coron, 5.

Cautwell *againſt* Church.

A Commoner brought an action upon the caſe for ſtopping of his way to the Common. And upon a writ of error it is affirm'd to be well brought, although he might have had an Aſſize, alſo perhaps a meer ſtranger had done it, and not the terre tennant; Alſo perhaps he that did the wrong is dead, and ſo that no Aſſ. And Mich. term enſuing, Judgement was affirm'd for the Plaintiff. In the firſt action. See Dyer 250. 22 H. 6. 15. 21. H. 7. 30. 33. H. 6. 26. *Intr.* H. 42. *Eliz.* B. R. rot. 437.

Bray *againſt* Patridge.

B. brought an action upon the caſe; That P. ſued for tithes, and recovered, becauſe there was niſi teſtis ſingularis to prove the payment, when in truth he had paid it before two, but now one was dead. And by the Court that an action does not lie, becauſe the cauſe was meerly ſpiritual. And for that it differs from 8. E. 4. 13. For there the Compoſition was a temporal contract, although it was for tithes.

Wright *againſt* Wheatly.

AN Ejectione firm. was brought de pomario, and well, for it need not be demanded by the name of a garden, as a præcipe ought to be. For an Ejectione firm. lies de domo, but the præcipe ſhall be pro Meſſ. And by Poph. that the 18 Eliz. an Ejectione firm. was brought de pomario, and well brought, and ſo it was now adjudg'd ve. 11. rep. 55. a.

NOte by Poph. that the 6. moneths upon the Statute of Uſury ſhall be accompted half a year, according to the Almanack, and not according to 28 days in the month, Which none gainſaid.

Dean and Chapter of Rocheſter *againſt* the Biſhop of Rocheſter.

IN an annuity, the Count was, that he was ſeiz'd of it in his Demeſne, as of Fee. And adjudged well enough, and the Records directly agree in it H. 19. H. 6. rot. 403. M. 12, H. 8. rot. 836 H. 30. H. 8, rot. 451. It was ſo adjudg'd upon a Demurrer, and that the Plaintiff had Judgement. And the caſe in Dy. 65. is the ſame. And H. 19. Eliz. was vouch'd Conſtable *againſt* Yaron. The Plaintiff counts of a grant of an Annuity in taple, virtute cujus, he was ſeiz'd of it in Dominico ſuo, ut de feodo talliato, and well enough, although that the Annuity be not within W. 2. and by Cook that an annuity is not within 23 H. 8. of Limitation, Poph. That ſee, if it be by original grant of an Annuity; but if it be by

grant of a rent-charge, &c. that is within the Statute. To which opinion of Popham, Gaudy and Fenner agreed; And in our Case ſeiſin was alleadg'd to be within 60 years.

Beechers Caſe.

B. Was in execution in the Fleet for 12000 l. at the ſute of Sir Thomas Shirley and one Swey, and being there he had the liberty of the Garden, and to play at bowles; And upon motion for the Creditors, it was ordered by the Court that he ſhould be in ſtrict cuſtody in his chamber. Then Beecher ſues a Habeas corpus to be brought to the Court, and there prayed, that for diſpatching of ſome neceſſaries, and to procure ſpeedy payment, that he might have a Habeas corpus to be brought to the Chamber of ſome of the Juſtices to diſcourſe with his Creditors; But it was denied by the Court, for he cannot have Habeas corpus to any place, but to the Court when the party is in execution, and if the Warden of the Fleet ſo do, it ſhall be an eſcape. And it was ſaid by Popham, which none denied. That if the party be confind to his Chamber by order of Court, and the Warden of the Fleet ſuffer him to have the liberty of the Houſe, that that ſhall be an eſcape; and yet it was ſaid that ſuch liberty is granted to the Fleet-Priſoners (paying a fine for it) to have that liberty under the Great Seal and Patent. Yet at that time there was not allow'd ſuch liberty to Beecher.

Allwaters *againſt* Bird.

A. Makes a feoffment to four to certain uſes, with power of revocation, upon tender of three ſhillings for a reaſonable cauſe to be ſhewed by him, and to be approved of by them; One of them dies: And adjudged in an Ejectione firm. that a tender to the Survivors and their approbation, is not ſufficient to revoke, &c. For that approbation was a thing of conſent, which cannot ſurvive, &c. ve. Dyer, 189. But by Popham, Otherwiſe it had been if the Feoffor had limited tender only to be made to two.

Bene *againſt* Tricket.

Inſtr. T. 43 Eliz. B. R.

The point of the Caſe was, if the value of the Church for plurality, by 21 H. 8. ſhall be eight pound, according to the book of Rates and Valuation in the firſt fruits office, or according to the very value of the Church per annum, Atkinſon. That according to the value of the Kings books. For the Parliament never thought, that any man could live upon ſo little as eight pound per annum, which is not ſix pence a day. Note 38 E. 3. 4. and Dyer 237. But by the Court, that it ſhall be according to the very value of the Church in yearly value in the ſtatute of 21 H. 8. And by Gawdy and Fenner, to whom agreed Yelverton; That the eight pound ſhall be accounted according to the very value of the Church, per annum.

Coolſton *againſt* Carre.

An Aſſumpſit was brought, and it was moved that the Count was ill in this, that the Plaintiff ſaid, that the Defendant aſſum'd to pay, &c. without ſaying to whom, &c. Crook, that in one Witbal's Caſe againſt Jones, in an aſſumpſit, the Plaintiff Counted that the Defendant in conſideration &c. ſuper ſe aſſumpſit ſol. without ſaying to whom, &c. and yet adjudg'd good.

good. But Stephens argued to the contrary ſaid, that, that Caſe put by Crook was, that the Defendant aſſumpſit et fidel. promiſit to the Plaintiff ſolvere 20 s. without ſaying to whom, &c. But in our Caſe no aſſumpſit or promiſe is allegd to be made to the Plaintiff or any other; And yet judgement was now given for the Plaintiff. Note 9 H. 6. 35. 45 Dy. 15. 2 E. 4. 20. 14 E. 4. 2. 3 E. 4. 11.

Carter *againſt* Codd.

CArter had recovered againſt Codd in debt, who was alſo committed to the Fleet for contempt, by the Lord Keeper. Carter ſues a Habeas corpus to the Warden of the Fleet to have Codd in Court, to the intent to charge him with the Judgement; But after the delivery of the Habeas corpus, and before the return of it, Codd was diſcharg'd of the contempt by the Lord Keeper; and the Warden returns the matter with a corpus parat. habeo, and brings him to the Court. Carter prays that Codd may be kept in execution for him, Codd prays that he may not: For the Lord Keeper may commit by his word without a writ, and ſo he may diſcharge the party, 14 H. 6. 8. But Codd. would not confeſſe that he was the ſame party againſt whom the Judgement in debt was had. Note, 22 H. 6. 23. And the Plaintiff had not day in Court to take the iſſue upon that. ve. 33. H. 6. 56. 38 H. 6. 1. Outlary. 43. 1 E. 4. 2. And alſo the Court would not give him his oath if he was the ſame Perſon or not. But yet it was prayd by Carter, becauſe that he alleg'd in Court that he was the ſame Perſon, againſt whom he had recover'd, and that he was now in Court; That he ſhould anſwer to a Declaration in an action of debt upon that Judgement. And that the Juſtices granted: and ordered that Codd ſhould put in ſpecial bayle to anſwer the action. And for not doing that he was committed to the Marſhall, and the Warden of the Fleet diſcharged of him.

Bolls *againſt* Laſſels.

THe Shaeriff returns A. upon an a Latit. and returns a cepi, having taken Sureties for his appearance, the partie does not appear, and upon that Proceſs iſſued to bring in the party; And upon that the Sheriff returns languidus, &c. where in truth A. was at large, and yet it was held a good return, although that no ſuch return was ever ſeen before: and although alſo that he might have retur'nd that he had let him at large upon bayle; For otherwiſe a miſchief would come to the Sheriff, for he is compellable to pay him. And if the partie does not appear, the Sheriff ſhall be amerc'd, and he himſelf ſhall be reliev'd upon his bond: and no action upon the Caſe againſt him upon that return. And upon that the Juſtices intended to enter quod querens nihil capiat per bill, and well. Note P. 43 Eliz. B. R. rot. 374. Spencers. An action upon the Caſe, as alſo, becauſe after a cepi returnd and to the Habeas corpus, the Sheriff returns languidus, where in truth the party was at large without bayle, and Judgement was given for the Plaintiff. But otherwiſe, if the Sheriff had let him at large upon bayle; And ſo Judgement was given, H. 44. Eliz. B. R. *Intr. H. 42. Eliz. B. R. rot. 1107.*

Blakebone and Hall *againſt* Browne.

IN an action of debt upon an obligation. The Defendant pleads the Statute 23 H. 8. cap. of Oblig. to the Sheriff, and alleadg'd that A. and B. his Sureties had not ſufficient in that County, &c. and ſo the Obligation *Intr. 43. Eliz. B. R. rot. 1073.*

void. Hubbard. and adjudg'd, that the Obligation is good. For that clauſe was for the ſecurity and indemnity of the Sheriff, the which if he will he may waive. And it differs from the caſe of 2. H. 6. upon W. 2. For there the pledges are for the benefit of the party. And that it hath been ſo adjudged. M. 42. 43. Eliz. C. B. rot. 607. Cliſton *againſt* Webb. Where one of the ſureties was inſufficient. And Gaudy deny'd Plowd. 67. And ſaid that it hath been adjudg'd to the contrary, That an Obligation with one ſurety is good enough. And Kempe Secondary alſo remembred that. But Godfrey of Counſel on the contrary ſaid, that it was adjudg'd in Burr and Appletons caſe, That the Plaintiff in the firſt ſute may have an action upon the caſe againſt the Sheriff if he does not take ſufficient ſecurity. Which caſe was not denied. And by Gawdy. That a bond without any ſurety is good enough between the Sheriff and the Obligor. And by Fenner, that it hath been ſo adjudg'd, Poph. was abſent, but Judgement for the Plaintiff.

Woodroffe *againſt* Michell.

Intr. H. 41. Eliz. B. R. 449.

ERror upon a Judgement in Line. The Error aſsign'd was apud Cur. tent. coram Rico. Elimſton Maiore, et A. B. C. D. ad num. 42 Capital. Burg: vill. prædict. and the Plaintiff entred, and the parties at iſſue, and for the tryal of it diverſe of the Burgeſſes aforenamed were return'd for Jurors, and found for the Plaintiff. And the Defendant now aſsignes that for error, and adjudg'd to be error, for they cannot be Judges and Jurors. And although that there might be other Burgeſſes of the ſame name, yet by the pleading of, *in nullo eſt error.* the party had confeſt that they were the ſame perſons. And Judgement was reverſ'd.

Brooks Caſe.

GOdfrey moves for a Prohibition, and ſurmiſes that the Pariſhioners had compounded with the Parſon for the tithes; but yet the due tithes were ſever'd, and expoſed, and the Parſon takes and carries them away, The Pariſhioner meets him and takes them from him, And upon that the Parſon ſues in the ſpiritual Court. And a Prohibition was awarded.

Walde *againſt* Lambert.

Intr. 10. 43. Eliz. B. R. rot. 279.

AN Action upon an Eſcape upon a Latitat before any Declaration, and the Sheriff returns a reſcouſe, That is no good return nor plea; for he might have have had a poſſe *Comitat.* as well for the ſerving of the ſame proceſſe as an Execution. 10 H. 7. 26. 33 H. 6. 1. 16 E. 4. 3. Nat. Bre. 102. Dyer 162.

Walrend *againſt* Winroll.

WAl. ſues Win. in an action of Battery in London. Win. removes it by Habeas Corp. to the Kings Bench; and the term after prays an Imparlance, and before the end of the term prays the privilege of the Eſchequer; The Puiſne Baron comes *cum lib. rubro*, and ſhews that Win. is Eſcheator, and ſo an accomptant to the King, and at length privilege was allow'd.

Barnes

Barnes *againſt* Worledge.

B. Brought an Audita querela upon the Statute of Uſury, and that he had borrowed 100 l. of W. for a yeare, and that it was agreed between them, that he ſhould pay 5 l. after 6 months, and the other 5 l. after the year, and verdict was given for the Plaintiff, and now mov'd in arreſt of Judgement, that that is uſury, and that the Plaintiff himſelf had declared that he had not cauſe of action. And by Cook that it hath been ſo adjudg'd upon an Information in the Exchequer; And Fuller Reader upon the Statute of Uſury at the Bar, was of the ſame opinion. But by Poph. if the party had retein'd 5 l. of 100 l. at the time of the leave, or that that 5 l. was to have been paid before the 6 moneths, that clearly had been uſury. The better opinion now, that the principal caſe was not uſury. Et Adjournatur. *M.43.44.Eliz. rot.548.*

The Churchwardens of Denfords Caſe.

P. 4. Eliz.

Denford was an ancient Church in the County of Northampton, And the Churchwardens ſue the Inhabitants of Kingſtead in the ſame Pariſh, where there was a Chapel of eaſe, for contribution to repair the Church of Denf. And they pray a prohibition upon ſuggeſtion that time out off, &c. they have uſed to repair their own Chapel; And only a part of the wall of the Church-yard of the ſaid Church of Denf. And it ſeem'd by the better opinions of the Court that it was not good. For their eaſe ſhall not be a diſeaſe to the reſt of the Pariſhioners. For Poph. ſaid, That the Aſſent is not requiſite to build a Chapel of eaſe, and then the Ordinary and the Parſon cannot charged the Pariſhioners with greater charge. By Yelverr. That the Parſon ought to repair the wall of the Churchyard. But by Fenner. The Pariſhioners in the ſpiritual Court ſhall be compelled to do it, although that the Franck-tenement be in the Parſon. Yelver. objected, and by Kempe Secondary, That the Pariſhioners of repair the Wall of the Churchyard Yet now it was ordered that a Prohibition ſhall be granted, and the Defendants if they pleaſe may demurr upon it. Note alſo B. 5 Iac. B. R. a Darbyſhire Caſe, where a Prohibition in ſuch caſe was denyed.

Reeve *againſt* Martin and Cooper.

Upon Evidence in an Ejectione firm. It was agreed by the Court, that a grant of a Copyhold by an Infant is good, for the Copyholder is in by the Cuſtome, and ſhall bind the Infant; As a preſentation by an Infant to the Church is good. *Intr. P. 43. Eliz. B.R. rot. 152. 4 rep. 23. 8 rep. 63.*

Cox *againſt* Carpen, Elye, and his Wife.

A Trover againſt husband and wife, for a converſion by the wife, dum ſola, &c. They appear and plead non ſunt inde culpabiles. And the iſſue is found for the Plaintiff, and now mov'd in arreſt of Judgement; That the iſſue was not good; For it ought to have been, that the wife ne fuit culp. And ſo was the opinion of the Court. And ſo alſo of Treſpaſſe by the wife; becauſe it is a perſonal wrong. But otherwiſe in debt debt, for that ſhall be againſt them in the debent &c. and the iſſue non debent, &c. ve. rep. 52. 34. H. 6. 19.

Markhams Case.

I. S. was convicted in the Starchamber, upon the Statute of the 5 Eliz. for forging of a grant of a Rent-charge, issuing out of divers houses of Sir Thomas Gresham in London for one hundred years. And thereupon had his Ears cut off, and his Nostrils clipt. And after he forg'd a Deed of Feoffment to B. and C. to certain uses; and was now arraign'd as Felon for that and hang'd, being found guilty of the second forgery by the Jury. And Cook said, that it was agreed by the Justices, upon the first conviction in the Star-chamber, That forgery of a Rent-charge or of a Lease for years is within the Statute; But forgery of an Assignment or a Rent-charge in esse, or of a Lease for years is not within the Statute; for that does not charge the Inheritance of any.

F. brought debt against M. upon a simple contract, M. wages his Law, and at the day he was demanded, and he did not come; Upon which, the Roll was marked that he had said of his Law, by Kemp Secondary, and costs assess. But afterwards sedente Curia, It was moved and pray'd that he might be demanded again, and it was granted, and then he made his Law.

Baspole *against* Long.

A Copyhold was surrendred to the use of A. for life, the remainder to B. in Fee, into the hands of customary Tenant in the presence of two others; And that the custome of that Manor was, That if at the next Court after such a surrender, it be to be surrendred, Proclamation was to be made, that if any claime, &c. to be admitted that he should come and he should be heard; and if none came, then two Proclamations were to be made; And if none came before the third Proclamation made and ended. That then it should be a bar to him and his heirs, to whose use such a surrender was made: and that in our Case A. did not come before the three Proclamations, &c. Wherenpon the Lord grants it to another. And it was held by the Court, that in our Case, he in the remainder is not barr'd after the death of A. For B. in the remainder cannot come and claym to be admitted presently; But the Lord shall hold it during the life of A. And a Case was vouch'd and agreed T. 29 Eliz. rot. 413. Rastall against Lane. A custom was that waste shall be a forfeiture of the Copyhold. And there adjudg'd, That waste by the Lessee for life, shall not forfeit the remainder in fee, but during the life of the Lessee for life only. Also a custome shall be taken strict: And Judgement was given accordingly. Note, it was adjudg'd P. 3 Iac. C.B. Whitton against Savage. That such a custome, (ut supra) shall not bind he that is over Seas when such a surrender is made, or when the Copyhold descends.

Stephen *against* Carter.

STephen brought an action of trespass against C. for divers things. As to part, the defendant said, that it was in default of inclosure by the Plaintiff; and as to the residue not guilty, and issue upon that joynd. But before the tryal, the Plaintiff confess the barr, and non prosequi ulterius entred, and after the issue is found for the Plaintiff, and well. For the Defendant had relinquisht that part without benefit of the Barr: and for that had pleaded not guilty. So by Popham. If it had been for a trespasse

paſſe in two ſeveral acres, and the Defendant juſtifies in one, and as to the other pleads not guilty; The Plaintiff may conſels part and have iſſue and verdict for the other. And judgement in our Caſe for the Plaintiff.

Payne *againſt* Ferrall.

A. Deviſes his Land to B. for twenty one years to commence at Michaelmas next after his death, the remainder to F. in fee. A. dies, B. enters at Michaelmas, the term expires. If he in the remainder ſhall take. Denne, that the remainder is good: and it cannot be compared to an Eſtate that paſſes by an act executed. ve. 1 rep. 64. A deviſe from and after my death, good. 18 Eliz. That a Deviſe for years, remainder to the ſaid heirs of I. S. in Fée is good, And that was not denyed, if I. S. dyed during the term. And the reaſon, as to me it ſeem'd: becauſe the Frank-tenement in the mean time, is in the Heir of the Deviſor, and not in abeyance. And Judgment order'd to be given accordingly.

Purrell *againſt* Biſhopp.

Vpon Evidence it was agreed, that if a Leaſe for years be made to A. and delivered to B. to the uſe of A. and B. enters to the uſe of A. If B. be ejected A. may have an Ejectione firm.

Collins *againſt* Phillips.

In an action of debt upon an obligation, dated 25 of September. The Defendant pleads, that a capias ad ſatisfac. was awarded againſt B. who was taken upon it 30 Septem. And that that Obligation was made for the enlargement of B. The Plaintiff demurr'd upon that, and had Judgement: becauſe it appears, that the Obligation was made before the arreſt, and for that it could not be avoyded by 23 H. 6. cap. But he ought to have pleaded that with a prim. deliber. after the arreſt. And it was agreed by Yelverton and Fenner, that if a cap. be awarded, againſt B. and before the arreſt the Sheriff takes an Obligation of him for his enlargement when he ſhall be arreſted; That by ſpecial pleading may be avoyded by 23 H. 6.

Oliver Saint John *againſt* Bawdripp.

The Caſe was thus, W. Bawdripp the Grandfather dies ſeiſed. Thomas Bawdripp the Father of the Defendant at age. Thomas makes the Defendant his Executor and dies. The Lord Saint John as Executor of an Executor, brought an action of debt for Reliefagainſt the Defendant, being Executor, &c, And well. ve. 20 H. 7. 1. Yelverton ſaid that the doing of the fealty is a contract for the Relief and Serviſes. Fenner doubted it, et adjournatur Dy: 24. 240. 39 H. 6. 31. 7 H. 6. 13. 11 H. 6. 15. And the Caſe was moved again at an other time, and then it was agreed by the Court,

1 That an Executor may have an action of debt for relief by the Common Law, without Fealty 32 H. 8. and that ſeiſin of the ſerviſes need not be alleaged when the Executor brings debt for relief, otherwiſe when the party himſelf avows.

2 That debt may be brought for that in a forraign County, and the Defendant cannot plead nihil debet; For relief is made certain by the Statute of Magna Carta cap. 2.

3. That

3. That debt will lie against an Executor for relief; The Testator could not wage his Law for that, because 'tis certain and a real duty: and it is not like to 41 Ass. 15. That an Estrape does not lie against an Executor, for that is grounded upon a personal wrong in the Testator. Also that action is expressly given by the Stat. against a Gaoler, and shall not extend, to an Executor. Also in the case of Relief. There was a real contract in the creation of the tenure, Poph. said, that in debt, for relief, the Plaintiff ought to shew the tenure in special, and by what part of a Knights fee the tenure: That the Court may judge what is due for relief. But in a writ of Ward, there, if it be a tenure by any part, it is sufficient for the Plaintiff to have Ward. And Judgement was given for the Lord St. John. And after error was brought, but the Judgement was affirm'd. Note, upon the tryal in this case, that the Manor of Odamsee in the Parish of Penmarke in Gl. is held of the Lord St. John, by service of Chivalry as of his Manor of Pen. by Homage, Fealty, & Escuage of 40 s. cum acciderit to 2 s. and to him &c. and by the rent of 6. s. 8. &c. and suit of Court.

Andrews *against* Cromwell.

Intr. P. 43. Eliz. B. R. rot. 358. & the sc. fac. T. 43. Eliz. B. R. rot. 649.

A Writ of error was brought upon a Recovery in an Ass. And amongst other things this was assign'd for error; because the writ of error was directed to the Chief Justice of the C. B. Because error in processu, nec non in red. judicii of an Assize of Novel disseisin, arraign'd before the Justices of Assize. In Recordo quod coram vobis residet. without shewing by whom the Judgement was given, neither how it came into the Common Bench; and yet by Tanfeild that it is good. By all the Justices that the writ is ill. vr. Dyer 76. 18. H. 6. Where it was before special Commissioners that had not a Clark of Assize.

Webb *against* Petts.

W. sues P. in the spiritual Court for not setting out the tiths of 2 acres. P. prays a prohibition, because he had set out the tithes of one acre in specie, and that a party unknown had taken them; and for the other he suggests a modus decimandi for 2 s. 6 d. and upon that, issue is joyned, and the witnesses said, that for a long time, as they heard say, the occupiers of that farm: whereof that acre, &c. had used to pay annually to the parson 3 s. for all tithes, and agreed by the Court.

1. As to the first, quod prohib. stet. For after the tithes are severed if any stranger takes them away, the Parson hath his remedy against him at Common law, and shall not sue the Parishioner in the spiritual Court.

2. It was agreed that a proof (by hear-say) was good enough to maintain the surmise within the Statute 2. E. 6. But as to the other acre Poph. held, that the modus decimandi is not well prov'd. But Fenner and Yelverton on the contrary; For by that appears, that the Parson is not to have tithes in specie, and so that had not any cause to sue for them in the Spiritual Court.

Crompton *against* Smith.

ERror upon Judgement in the Village of Ludlow. Debt was brought upon in simul computav. and counts of many particulars, that amounted to 3 d. more than he had demanded. And that was held error; but because

cauſe it was of ſo ſmall a thing, afterwards the Court propounded a compoſition, to which the parties agreed. Note Dy. 55. and the difference; For there the Declaration and Judgement were good, and the caſting up of that after, is the act of the Clark. Note alſo 7 H. 6. 26. For there the Leſſor may have Debt ſeverally, for the ſeveral arrerages of every year, if he pleaſe, and for that he need not ſhew how he was ſatisfied of the arrerages of the other year.

Harvey *againſt* the Keeper of a Park.

The Indictment was held ill by Fenner and Yelverton, being only in Court, Becauſe the value of the Croſſebow was not put into the Indictment, according to the Statute. Alſo the ſtroke was ſuppoſ'd to be done at D. whereof the party inſtanter obiit at S. which is impoſſible. And ſo apud D. interfecit. And upon that the proceſſe upon the Indictment was ſtaid.

Elwin *againſt* Mountford.

M. had recovered againſt E. by default in the Kings Bench 42 Eliz, and error now aſſign'd, becauſe there was not any bayl put that term, and then there was not any appearance, and that being ſo certified, the Judgement was preſently revers'd. See the like caſe 3, 39 Eliz. Holman *againſt* Collins. B. R. *Intr. T. 42. Eliz. B.R. rot. 679.*

Colſton *againſt* Roſſe and Levet.

Debt upon an eſcape againſt the Defendants, as Sheriffs of the City of York. And counts upon a Judgement given in that Court there, for the Plaintiff, upon an Obligation made by one R. Layton; Without ſhewing, that it was made within the Juriſdiction of that Court. Yet Judgement was given for the Plaintiff. *Intr. T. 42. Eliz. B.R.*

Stephens *againſt* Totty and his Wife.

A Prohibition pray'd, upon a ſuggeſtion, that he was ſued by them in the Spiritual Court, for a Legacy to the wife; Where he pleads a releaſe to the Husband. They appear, and the wife ſaid that ſhe ſued a divorce, a menſa & thoro, for adultery of the Husband, before that he made that releaſe. Yet it ſeem'd to the Court, that that releaſe binds the wife; For that does not diſſolve the marriage a vinculo matrimonii. Note, 26. H. 6. 7. But after arguments by the Civilians. Poph. ſaid that a Conſultation ſhall be granted, (ſo they in the ſpiritual Court admit that plea.) And Dr. Crompton ſaid, that then it is clear that the wife there ſhall recover. *Intr. P. 44 Eliz. B.R. rot. 342.*

Gaſcoigne *againſt* Longvill.

At Serjeants Inne, in Juſtice Pophams Chamber. By Popham and Anderſon chief Juſt. Pepper Surveyor, and Heſket Attourney of the Court of Wards, upon a caſe there depending. Office was found that one Haſlewood was ſeiſ'd in fee of lands die quo obiit, and that he held them of the King in Capite. It was agreed by them to be good enough, without finding of the very dying ſeiſ'd, for ſo it ſhall be intended. Note, that the writ Diem clauſit extremum is, die quo obiit F. N. B. 252. So alſo in a writ of Aſſize of Mor Dauceſter, Die quo obiit idem, 195, 196.

Die quo itr. &c. And that there are many presidents accordingly; who find the dying seis'd. Sed abundans cautela non nocet. And decreed accordingly. Note, 1 H. 7. 24 a.

AT the same time and day, being Wednesday. post octab. Trinit. Bacon. of Grays-Inne put this question. A. leases for life to B. upon condition, that if he pays 10 l. at Michaelmas to the Lessor, that he shall have the same to him in tail, The remainder to I. D. in fee. The 10 l. is not paid; If now he in the Remainder shall have the Fee, or if the Contingent and accrewer extend as well to the Fee, as to the estate tayl, or if the fee vests presently. Poph. That is a Poote point. Anderson. You will not be able to prove that by any book of law. But if you were to read, it is a good poynt for you.

Penistons Case.

AT the same time it was also resolv'd by the Justices. That if tenant in tail bargains and sells, and the bargainee levies a fine with proclamations, and 5 years passe: And after tenant in tayle dyes, That the issue shall have 5. years after his death to make claim, for his title is saved by the Statute: For the tenant in tail himself could not have claim'd it against his bargain and sale.

Moorton *against* Brigs.

AT that time the Justices voucht this case. It was found by office, that A. dyed seis'd of 40 acres of land in D. whereof certain lands were held in Capite, a melius inquir. was awarded.

AT the same time also it was agreed by them, That if Tenant in tail of lands in Capite, grant his estate to A. and his heirs; and A. dies his heir within age, that he shall not be in Ward. But by Poph. That if he had bargain'd and sold the land to A. and his heirs; The heirs of A. should have been in Ward. But Anderson denyed that.

Sir Clement Heigham *against* Bedenfeild.

IT was agreed by the two chief Justices, and so also afterwards agreed by all; That if tenant in tayl covenant to stand seis'd to his own use, for his life, The remainder to his son; And after he levies a Fine to A, to other uses. That these last uses are good against the Son. For when he had limitted the use for his life, that was all that he might lawfully do, and it was no alteration of the estate of the Covenanter; For his wife shall be endowed. 3 rep. 52. It is there so (verbatim) agreed, H. 38 Eliz. Stapletons Case.

Salter *against* Butler.

Intr. T. 44. Eliz. B. R. rot. 401.

IN an action of Trover, and conversion for 8 Heifers. The Defendant said, that a rent charge of 16 l. per annum, payable at 4 feasts was granted to B. his Executors and Assignes, during the life of D. and that he dyed intestate; and that F. took Letters of Administration, and that the Defendant as servant to F. did distrein the said Heifers for arrerages, &c. and put them in a pound overt, which is the convers. &c. And the Plaintiff demurr'd, and agreed by the Court that the plea is not good; For he hath not confess'd any convers. for in the pound the beasts were

were in the cuſtody of the Law; And ſo it does not amount to a general iſſue, For the matter in Law, it was reſolv'd. That an adminiſtrator cannot be Aſsignee to take that, becauſe it was a Franktenement, and he cannot be an Occupant of ſuch a Rent; But it paſſeth to the benefit of the terre-tenant. As Plow. 133. Where a Rent-charge paſſeth away by a Condition broken. And by Winrell who argued for the Plaintiff, that there ſhall be no occupancy of a Copyhold, but it ſhall be to the benefit of the Lord. Note Dyer 294. a. and by Popham and Fenner, If a man hath granted a rent-charge to another for the life of I. S. the remainder to the right Heirs of I. S. If the Grantee dies living I. S. the rent ſhall paſs to the benefit of the terre-tenant; but if I. S. dies living the auter vye, his Heir ſhall have the rent after the death of the auter vye. Note that good Caſe. And by all the Juſtices: If in our Caſe B. had aſsign'd that rent, &c. the aſsignee ſhould have had that during the life of D. And by Gawdy and Fenner, If the Grantee had deviſed that Rent, that the Deviſee ſhould have had that Rent during the auter vye. But in this Popham was on the contrary. For that is not deviſeable by the 32 H. 8. becauſe it is not free; Nor by the Common-Law, becauſe it is not a Chattell. And in the principal Caſe Judgement was given to the Plaintiff.

King *againſt* Hobbs.

IN an aſſumpſit the Caſe was thus. A cap. ad ſatisfac. at the ſute of the Plaintiff was directed to the Sheriff of Wilts to take one Thomas Hobbs; and that the Sheriff mandavit A. B. C. and D. quatuor Balivis ejus. eorum cuilibet to take the ſaid Thomas Hobbs; By vertue of which A. and B. takes the ſaid Thomas Hobbs, and that Francis Hobbs in conſideration of the diſcharge of the ſaid Thomas aſsumed to the Plaintiff, &c. And it was mov'd in arreſt of Judgement after verdict for the Plaintiff, that the arreſt by two of them, was not lawfull. As 27 H. 6. 6. An Obligation by three jointly and ſeverally, two of them cannot be ſued. So Dyer 62. And Fenner ſaid; That he was in Shellyes Caſe in the Chancery. A Commiſsion was awarded to eight, ſix, four, or two of them and the Commiſsion was executed by three; And it was held void. Gawdy anſwered, that that was a judiciall act But in our Caſe only miniſterial, and an Authority without any colour of Intereſt. And for that it was well executed by two. But it was agreed by all, that the mandavit was good, without ſhewing it to be by deed. A caſe was cited of a Priſoner diſcharg'd by paroll. Popham being abſent, it was adjourn'd. And at another day it was moved again, and the Judgement was ſtayed. For the aſsumpſit was alleadg'd to be apud Weſtport, and the Viſne was of VVeſtport without F. Note for the firſt point. Litt. 181. hath the very Caſe. *Intr. T. 44. Eliz. B. R. rot. 421.*

Hynde *againſt* Deane.

MAchin being ſeiſed of two Mannors in Woodbury in the County of Cambridge, and Willousby in Middleſex, and of 8. acre in Hackney; Acknowledges a Recognizance of 1100 l. to Hynde 31 Eliz. and after 34 Eliz. he acknowledges another recognizance of 2000 Marks to Deane. Deane purchaſeth 81. acre, and the Recogniſance to D. is for feited; and he ſues execution in Cambridge and hath the Mannor of Woodbury in execution. And afterwards the Recogniſance to Hynde is forfeited, and W. Hynde his adminiſtrator ſues an Elegit, had the moyety of the Mannor of Woodbury in execution, and well. And upon that Deane ſues an Audita Querela in the Common Bench againſt Machin for a contribution of the *Intr. 43. 45 E. B. R. rot. 206.*

moyety of the Mannor of Willousby in Middleſex, of which Machin was in poſſeſsion. And there was Judgement for the Plaintiff. For a purchaſe of part of the Land, &c. is no barr, to have contribution againſt the Conuſor himſelf. Pl. 72 b. alſo it does not behoove the eldeſt Conuſee to have a ſcir. fac. againſt the youngeſt Conuſee, no more than againſt a Feoffee; And the reaſon ſeems to me to be, becauſe it appears upon record that his title is youngeſt. 9 E. 2. and 22 E. 3. 7. Yet the youngeſt Conuſee after the firſt is ſatisfied: ſhall re-have the Land ve. 19 E. 3. Eſtr. defaits 171. ſciri fac. 12. And now upon errour, it was order'd that Judgement ſhould be affirm'd.

Rooke *againſt* Sprat.

Upon evidence. It was ſaid by the Court abſente Poph. That if tenant in taile of a remainder in Fee, diſcontinue; And retakes an eſtate in Fee, and deviſes it to his wife for life, the remainder to B. for years, the remainder in Fee to him that had the remainder in Fee before: and dies without iſſue. The wife enters and dies; He in the remainder is remitted, and may enter upon the Deviſee for years, and will avoid the Leaſe, although that his remainder be created by the ſame will. Note 9 H. 6. 43. Remitter avoids a Leaſe for years without entry 15 E. 4, 6.

Clements *againſt* Caſſye.

A Leaſe was made to try a title of a Houſe, and the Leſſee enters into the houſe, and the Wife of the ſaid former Leſſee ouſts him and farms the Houſe: and after the Husband came there, yet the Ejectione firm. was brought againſt the Husband only, and well. And the matter in Law for the title was. A. ſeiſed of Bl. acre. and Wh. acre in Fee. deviſes both to his Wife for life, the remainder in B. acre to B. in Fee. Item I make my wife Executrix of all my goods and lands. By the Court that does not give the Fee of W. acre to the Wife. For Lands ſhall intend ſuch land as She may have as Executrix. But by Popham, otherwiſe it had been if he had ſaid, I make my wife heir of all my lands.

Carey *againſt* Stephens.

An action of tran. quare vi. et armis was brought for caſting Wine upon his Velvet, and well. Although that he might have brought for that an action upon the Caſe ve. 12 H. 4. Treſpaſs for caſting dung againſt his Wall.

B. brought errour upon a Judgement given in the Court of Lynn. The Caſe was. B. had ſold certain Wines to A. and warranted them to be the beſt Wines in England; When in truth they were corrupt and nought. And Judgment was reverſed, becauſe he had not aver'd in that action, that there was better or as good Wine in England.

Whartons Caſe.

Intr. T. 43 El. B. R. rot. 979. The Jurors acquitted him of murder, and found it man-ſlaughter, Contrary to evident proof for the murder of one Herlakerden in Kent, by Wharton and three others. And the Jurors were puniſh'd in this manner, Three of the Jurors that were principal Leaders of the others, and alſo ſuſpected to be corrupted by Whartons Friends; were committed to pri-

ſon

ſon, and to pay 20 marks a peice to the King for a Fine, and to be bound to their good behaviour, and for the good behaviour of the priſoners acquitted by them: and to remain in priſon for a year, and after that done to be delivered. Six other leſſe ſuſpitious were fined 10 l. a piece, and to be bound in a recognizance for the good behaviour of the priſoners, and of the other 3 Jurors before. And the laſt 3 becauſe they much diſagreed, and did not conſent, until by long time and perſwaſion they were miſled by the others, contrary to their evidence. And becauſe they had not ſo declared themſelves, and prayd advise of the Court before verdict given; they were committed to priſon, and to pay 5 l. a piece. And Poph. ſaid there were Preſidents to that purpoſe. A. was found guilty, and enquiry of the goods were made: And becauſe the Jurors would not find the value of them, as it was plainly prov'd; they were awarded to priſon, and fined to the King. Another preſident before the Juſtices in Eyre. The Jurors acquitted a priſoner, contrary to their evidence; And for that they were fined and impriſoned, and bound for the good behaviour of the priſoner during his life. And to this day the Juſtices of the Kings bench are the ſupream Juſtices in Eyre, and ſuch an offence is not to be ſuffered. And the Jurors were preſently committed to the Marſhalſey; And they were ſo puniſht by the advice of all the Juſtices.

Moyle *againſt* Ewer.

VPon evidence, It was mov'd by Cook, that an Indenture of Feoſment and Letter of Attorney in it, is not good to a Stranger to make livery. But otherwiſe of a Deed poll; becauſe in that 20 men may be made parties one after another. But in an Indenture thoſe between whom it is made, onely are parties to it. But by the Court, that is goodenough, and that it is a common caſe, and a common uſe. vc. Cook, Litt. 52, and Note, Cook Entrys 192. A preſident to the contrary: Other matter was mov'd. A. grants to B. Medietat. Manerii ſui of C. and 8 rood of land in C. Excepto over all other lands and tenements in C. whether all the manno of C. paſſes or not. Poph: That a moyety only paſſes. But Gawdy, Fenner and Yelverton were on the contrary, that all paſſ'd, and the Jury found for the Plaintiff accordingly.

Hartland *againſt* Yates.

BY Poph. That it is clear, that if an erigent be awarded againſt A. and after he is quint. exactus, and before the return of the erigent A. dies; Yet the Outlawry ſhall ſtand in its force, and ſhall not be reverſed; For Judgement was by Coroners upon the quint. exactus, and they may certifie the Outlawry. But otherwiſe if A. had dyed before the quint. exact. Which was not denyed.

Johnſon *againſt* Herne.

THe Plaintiff in an Ejectione firm. was admitted to ſue by Guardian, becauſe he was within age, and they are at iſſue, and at a niſi prius in the Country; The Juſtices aſſign him a new Guardian, and it was found for the Plaintiff; And that matter was now mov'd in arreſt of Judgement. And by the Court, abſente Poph. That it was good, and that the Juſtices at a niſi prius may aſſign a new Guardian. And Judgement for the Plaintiff.

H. 45. Eliz. B. R.

HEale mov'd, that an Obligation may be delivered as an Eſcrow to the party himſelf, upon condition to be his Deed upon ſpecial delivery. But if afterwards it was delivered as a Deed, and not by ſpecial words as an Eſcrow: Then the Condition ought to enure, to make that no condition upon the matter that it was made at the beginning. Poph. and Fenner agreed by a ſpecial delivery, Gawdy accordingly. Yelvert. only was on the contrary. And that all the caſes in our books are put, of ſuch delivery to a Eſtranger. Note, Dy. 34. 9 rep. 136. 137. And that difference reconcil'd all the books. Cook, Litt. 36 a.

Webb *against* Hinde.

W. ſues a replevin, H. removes it by a Recordari into the Kings bench; The Plaintiff does not declare, and upon that a return awarded to H. and the Sheriff upon that returns averia elongat. And then a Withernam was awarded, and executed, and now comes the Plaintiff and prays to declare, and prays a deliverance of the Withernam. And it was teſtified to the Court by the Clarks. That upon ſubmiſſion of the Plaintiff to the Fine for not declaring, and that impoſ'd upon him by the Judges, he ſhall have deliverance of the Withernam, and ſhall declare. And now a Fine of 3 s. 4 d. was impoſed upon the Plaintiff, and then he declar'd, and had deliverance; Note, the courſe of the Kings bench is contrary to that of the Common bench.

Chandflower *against* Waterhouſe and Presbye.

Intr. M. 44. 45 Eliz. B. R. rot. 378.

COvenant was brought. That whereas C. had delivered to the Teſtator of the Defendant 70 Hogſheads of Copprass upon condition to pay 170 l. at a certain day, and if it be not paid, &c. that then it ſhall be lawfull for the ſaid C. peaceably and quietly habere, capere, &c. the ſaid Hogſheads. And ſaid that the money was not paid, et quod non potuit pacificè et quietè habere, &c. Which was nought, becauſe he had not counted: How he was diſturb'd at the taking of them. Note 3. E. 2. Covenant 6. And Judgement quod quærens nihil capiat.

Lawe *against* Sanders.

Intr. P. 44. Eliz. B. R. rot. 54.

DEclaration in an Aſſumpſit was. S. complains againſt S. i: the cuſtody of the Marſhall, &c. that in conſideration that the aforeſaid S. would marry M. the daughter of S. ſuper ſe aſſumpſit. And it was ſaid to be ill; Becauſe he had not ſhewed who made the aſſumpſit, and Declarations ſhall not be aided by intendments. This was mov'd in arreſt of Judgement, and it was ſtaid.

NOte that Poph. ſaid, Upon the tryal of Wilburn for the death of Potter, That if two be fighting, and there are more looking on, who do not endeavour to part them; if one be kill'd, the lookers on may be indicted and fined to the King. Yelvert. conceſſit.

Musket *against* Cordall.

Intr. T. 44. Eliz. B. R. rot. 422.

C. Recovers in the Common Bench againſt Musket, being an Attourney of that Court, and Judgement upon a non ſum informatus, et quod defend. in miſericord. And that was now mov'd for error. Becauſe the Defendant is intended to be all times preſent in the Court.

But

But Judgement affirm'd because he had imparl'd, and had defended vim et injuriam quando, &c.

Aynesworth *against* Battye.

I. S. devises to every of his younger sons B. C. D. and E. 20 l. a peece, to be paid when they shall severally come to the age of 21 years; And devises his land to A. his eldest Son, and his heirs: Upon condition, that if he refuses to pay these legacies; That then that land shall remaine to the younger sons, Et, &c. A. pays the Legacies to B. and C. and refuses to pay them to D. and E. D. enters into the land in his own right, and the right of E. upon the heir of A. in by discent. And it was resolv'd. *Intr. H. 41. Eliz. B. R. rot. 1061.*

1. That the younger sons may enter upon the refusal, &c. by way of limitation.

2. Although that he had paid the Legacies to two, yet their entrie is also lawfull.

3. That the discent doth not take away their entrie.

4. That by the Entry of D. in his right, and the right of E. the estate is vested in all 4, For they take jointly, and the estate of the heir devests from him in all.

Gardener *against* Harrison.

G. had recovered against B. 100 l. in the Common Bench, and had a cap. ad satis. and B. was enlarg'd. Whereupon G. sues a cap. utlagat. against B. directed to the Sheriff, quod non omittat. And the Sheriff delivers it to Harrison being Bayliff of the liberty of Stepney. That it appear'd to the Lord Wentworth, that had there the return of all Writs, that H. the Defendant had apprehended B. such a day at White-Chapel, and had him in his custody, and that after he suffer'd him to escape. The Defendant demurr'd upon that, Because the Writ was directed to the Sheriff, and he himself ought to have executed it, and the arrest by the Bayliff was not lawfull. ve. 5 rep. 88. a, b. By which the party may have an action of debt upon an escape.

Farmer *against* Ward.

M. 37. 38. Eliz. C. B.

By Anderson and Walmesly. That voluntary waste is a forfeiture of the Copyhold by the Common law; But negligent waste not without a custome.

Burchier *against* Wiseman.

IT was said by Anderson and Walmesly, That the ancient Sheriff is not discharged till he hath delivered the County to the new Sheriff, although that the Patent be sealed. Dyer 355. And by them agreed. That if in the Deputation of the UnderSheriff, there be such a clause; (that he shall not meddle with any Execution above 20 l.) that that is void as to the Subjects, who are not bound to take notice of such private agreements and Indentures; And it is void as to the under Sheriff himself, As it was adjudg'd H. 12 Jac. C. B. Sir Dan. Nothon *against* Gouldsmith. And by 22 Eliz. cap. And Authority cannot be so appertioned. Dyer 175. 4 rep. 33.

Harvey

Harvey *againſt* Bateman.

That if a man aſsign an obligation to another for a precedent debt due by him to the Aſſignee, there, that is not maintenance: But if he aſsign it for a conſideration then given by way of contract, that is maintenance, vc. 34. H. 6. 30.

The Counteſſe of Rutlands Caſe.

She brought a detinue for a Coach; The Defendants pleads an attachment according to the cuſtom of London, hanging the writ; By the Court that is not good. And ſo was the opinion of the Kings Bench.

Broth *againſt* Archer.

Upon evidence it was held by Anderſon. That if a feme Covert, eject one, and that afterwards the Husband aſsents; That yet the Husband is not an Ejector. For an Ejectment is made in an inſtant, and hath not a continuance. Otherwiſe of a diſſeiſin.

Odander *againſt* the Hundred of Grodley in Surrey.

In Debt, upon the Statute of Hue and Cry. It was reſolv'd that notice given to the next Village forward in the road is good, although that it be in another Hundred, and although that there was another Village a latere nearer, in the ſame hundred. For it cannot be intended that a ſtranger ſhould have ſuch preciſe notice or knowledge of the Villages in a ſtrange place. So alſo P. 38. C.B. Stinchcomb *againſt* the Hundred of Benhurſt in Berks. vet lege the Statute 27 Eliz. cap. 13.

Patridge *againſt* Naylor.

Upon evidence, in an action upon the Statute 1 and 2. Phil. and Mary. Although that one diſtreſſe be put into ſeveral pounds, yet one Replevin ſhall ſerve. There that is not within the Statute. Otherwiſe if it had been in divers Counties, or ſeveral Franchiſes, Where there ought to be ſeveral Replevins. And if ſeveral men take the diſtreſs, that 5 l. ſhall be upon every of them, becauſe the Statute ſays every perſon offending, and not for every offence: and that before that time it had been ſo adjudg'd, and after the Judgement upon error in the Kings Bench was reverſed, but it was for another cauſe; And the Court now trebled the damages and 5 l. againſt every offender. But after error upon that very poynt in T. 38. Eliz. in the Kings Bench, between the ſame parties; And by the Court it was error. Yet they gave a day for preſidents. Dyer 177 b.

Strickland *againſt* Fallowfeild.

In a Formedon in Diſcender. The Demandant counts of a gift to A. and B. then a feme ſole; And to the heirs of their bodies engendred. That they intermarry, and that they as heirs of their bodies, &c. And the tenant demurs, becauſe he had not ſhew'd the place where the marriage was ſolemnized, For without marriage no right in Diſcender in tayl, and that is iſſuable. But by Walmeſly upon a Count in Frank marriage, a man need not allege the marriage. Which the Court granted.

Snelling

Snellings *againſt* Norton.

S. brought an action of debt againſt N. as adminiſtrator, the Defendant pleads upon a preſcription, That by the cuſtome of London, Debt lies againſt an Adminiſtrator, without any ſpecialty, upon a conceſſit ſolvere to the Teſtator: And that a Recovery hath been had againſt him upon ſuch a ſute, and that was held a good Plea; For debt againſt an Adminiſtrator is not firſt given by 31 E. 3. but that was at the Common-Law, and the Statute is Declarator. 19 E. 3. 4. Pl. 27 1.

Ardens Caſe

By Beomond. That rien ruie en le. is a good Plea in waſte. Walmſly you may ſee the difference; When the waſte is brought by the firſt Leſſor himſelf, and when it is brought by the Grantor of a Reverſion: in the one Caſe it is good, in the other not. Note alſo theſe bookes vouch. 5 H. 5. 12. Br. Waiſt. 72. 46 E. 3. 20. Br. Waiſt. 45 H. 8. 6. 5. And note if they warrant that difference, the reaſon is, becauſe of the contract and privitye between the parties at the making of the Leaſe.

Lord Willoughby *againſt* Kempe.

IT was ſaid by the Court that a grant of an Office, of keeping the Courts of the Dutchy land by privy Seal is not good; But it ought to be by Dutchy Seal.

Yelverton *againſt* Cornwallis.

Y. Covenants with C. to make an aſſurance of Bl. acre before P. by Indenture. Y. dies the Covenant not perform'd, and the very original Deed comes into the hands of the Executors of Y. and C. brought a writ of covenant upon the Counter-part. And it was ſaid by the Court, that it doth not lye without the deed it ſelf. Walmſly. He may have an action of detinue, to recover the deed.

NOte, A. Leaſes to B. by Indenture for years, in which alſo were divers Covenants; and amongſt the reſt, there was a Covenant to pay the rent, and the Leſſee was oblig'd to perform all Covenants in that Indenture; And an action of debt was brought for non-performance; and aſsigns breach in non-payment of the rent. And the Defendant pleads performance. And by the Court, that is not a good Plea: without the ſaying how he had performed; And agreed alſo by the Court, that the Leſſor need not demand the rent. But otherwiſe it had been if the Obligation had been made expreſly for the payment of the rent. And by Walmſly, that it had been ſo adjudg'd in that Court, ye. 22 H. 6. 57.

Griffin *againſt* Sheet.

IT was ſaid by the Court, that a writ of diſceit lies againſt the Heir of him that had recovered. Note 8 H. 6. N.B. 97. C.

Akeram *againſt* Warren.

VPon falſe impriſonment. The Plaintiff counts of an impriſonment in the County of B. and alſo in the County of W. And by the Court it was ill. For he cannot joyn in the tryall, becauſe it is a locall treſpaſſe: but the Plaintiff ought to have had ſeveral Writs. But a man may juſtifie battery by an aſſault of the Plaintiff himſelf in two Counties: For that is tranſitory. 13. 11 H 4. 14. But not found.

Lord Ivers Caſe.

DEbt was brought upon an Obligation, &c. By the Court. That an Obligation to the Sheriff to appear and anſwer, &c. is void by 23 H. 9. cap. 10. But otherwiſe if it had been to appear to anſwer; For the party by the Law may appear and yet judgement may be given by default.

Fiſher *againſt* Truſſlow.

THat pleading, quod villa de Beverly incorporata fuit, was good enough, although that it be better pleading, to ſay, That the Maior, Burgeſſe, &c. or the Inhabitants were incorporate, &c. Note in the Statute of Wincheſter, That the Hundred ſhall anſwer, &c. And ſo in other Statutes the Village is taken for the Inhabitants, and Dyer 100. a. is ſo.

Tottell *againſt* Howell.

IT was held by the Court that herbagium, for years, cannot be granted without Deed. Note 17 E. 4. 6.

Jennings *againſt* Bragge.

IT was ſaid by the Court, That a writ of errour bearing teſte before the Judgement be entred of record, is void, although that the Juages have pronounced Judgement, (viz.) quod intr. Judic. Note 1 R. 3. 4. is contrary.

Byrons Caſe.

HE brought an action of debt as Adminiſtrator, by the Letters of Adminiſtration of the Biſhop of York; Becauſe the Teſtator had bona notabilia in divers Dioceſſes in his precinct, upon an Obligation then being within the Province of Canterbury. And adjudg'd that it is not good, and the Prerogative of York does not extend to Canterbury. And by Anderſon, if a man dies having bona notabilia in Canterbury and York, Canterbury ſhall have the prerogative. And by Walmſly and Beom. That the debt upon a ſpecialty is bona notabilia in that place where it is, at the time of the death of the party; But debt upon a ſimple contract, there where the party himſelf dies.

Lerke

Leake and Michell *againſt* Howell and Hale.

AN Inforꝛmation in that term was exhibited in the Exchequer, upon the 1 Eliz. cap. 12 and 19. of Tares, Cuſtom, and ſubſidy. Note, that Merchandizes, and by way of Merchandize in the Statute, and upon thoſe Statutes was now reſolved. And that goods taken by Letters of Marque and Repriſal, ſhall pay ſubſidies. Which was ſaid in Captain Preſtons caſe.

2. That the Inforꝛmation was good, ſaying that the goods were landed as merchandizes, although he did not ſay brought in by way of Merchandize. And it was agreed by all, That if a man buy goods beyond Sea, foꝛ his own pꝛoviſion, That is not within the Statute.

Beale *againſt* Taylor.

THe better opinion was, that if pꝛoceſſe was delivered to the Sheriff, and he takes the party without ſaying any thing, that yet it is good; foꝛ otherwiſe the Sheriff ſhall be a Treſpaſſer; which the Law does not intend. And the Sheriff hath any lawfull authourity ſo to do. So alſo it is, although the Sheriff had not the pꝛoceſſe about him at the time of the Arreſt.

Ellwin *againſt* Moore.

E. brought an action upon the caſe againſt M. foꝛ woꝛds, Thou art a Thief, and haſt robb'd my ſon, without averring that he hath oꝛ had a ſon; And yet it was held good by the Court. Becauſe the woꝛds Thou art a Thief are actionable, becauſe of diſcrediting the party in the audidience of others, who know not if E. had a ſon oꝛ not. So if he had ſaid, for thou haſt ſtollen my horſe. It was good without averring that he had a hoꝛſe.

NOte, it was ſaid by Owen, If there be 2 Joyntenants in London, Joyntraders, and the one dies, that the ſuꝛvivoꝛ ſhall not have all, but the Executoꝛ of the other ſhall ſhall have his part. To which the Court agreed. And ſo it is of a Joynt obligation to them foꝛ ſuch wares.

Wentworth *againſt* Wentworth.

ONe brought Dower in the C. B. in 37, 38 Eliz. And the caſe was thus. A rent was aſſign'd to her foꝛ Dower out of land, to which there was a condition that if the rent be in arrear and unpaid, that the grant ſhall be void, and ſhe reſtoꝛ'd to her action foꝛ her Dower; And averr'd. And it was adjudg'd.

1. That rent aſſign'd foꝛ Dower, and ought to be upon condition, how the ſame Dower could not be upon condition; becauſe the rent is a thing collateral, although that it ought to be of the ſame land.

2 That there need not be any demand of that rent (foꝛ in our caſe the Demandant had not alleg'd a demand of the rent.) But it was diſtreynable of Common right. Alſo the party need not allege a demand of the rent, when it is to ceaſe by the non payment to the pꝛejudice of him that demands it, and P. 38. Eliz. Judgement accoꝛdingly foꝛ the Demandant.

NOte, by Anderſon and Walmeſly, That not guilty is a good iſſue in an Aſſumpſit, or detinue. Becauſe a wrong is ſuppos'd; And 19 H. 6. Agreed by the Prothonotaries. And ſo debt upon the Statute of Wincheſter for robberies. But in debt it is not good. And yet in debt not guilty hath been pleaded, and iſſue upon that, and verdict paſſed upon it, And by the Court it is now good, and help'd by the Statute of Jeofailes, becauſe it is only miſ-joyning of the iſſue.

Cooper *againſt* Columbell.

VPon Evidence in an Ejectione firm. By Walmeſly, That a gift in tayl, &c. to the Leſſee at will, or tenant at ſufferance, as Dyer 61. is good without livery and ſeiſin; for poſſeſsions countervail Livery. Note by E. 5. Dy. 145. b. & 269. b. accordingly. And if Leſſee at will make a Leaſe for years to commence in futuro, it is not a preſent diſſeiſin. And Beomond agreed. Note, that if Leſſee at will, leaſe to B. for years, and B. enters, B. only is the diſſeiſor. ve. 12 E. 4. 12.

BY the Court. That error does not lie againſt the Queen upon a petition where ſhe is immediate party to the recovery; But otherwiſe where ſhe is party only as for conformity, as in an action upon the Statute, or in a popular action. Note in Tr. 29 Eliz. B. R. Glazier *againſt* Hudleſton. Where the difference is for an inheritance, or a real action. ve. 23 E. 3. 22 a. 22 E. 3. 3. a.

Dennyes Caſe.

IT was ſaid by the Court, that debt lies againſt the heir of an heir upon an Obligation of the Anceſtor, who obliges himſelf and his heirs unto the 10th. degree. ve. Dyer 344. Debt againſt the Executor of an heir.

Woodroff *againſt* Greenwood.

Intr. 38. *Eliz.* C. B. *rot.* 90 12.

C. tenant in tayl, the reverſion to the Queen, leaſes to A. for 21 years; A. aſſignes that to B. and Covenants, that B. ſhall enjoy that, without the moleſtation, expulſion, or eviction of any perſon, except the Queen her heirs or ſucceſſors. C. dies without iſſue, the reverſion being granted before to Wentworth, who enters upon B. and B. brought a writ of Covenant. And by the Court it was well brought, without acquittance. For the leaſe by tenant in tayl although it be according to the 21 H. 8. it does not bind him in the remainder or reverſion.

Thomſon *againſt* Clark.

AN action upon the caſe was brought againſt C. And he counts upon a trover and converſion of his goods in the County of Nottingham; The Defendant pleads a recovery againſt the Plaintiff, in the Upper Bench in an other action, in which he had 20 l. damages, and for thoſe damages a fier fac. iſſued out of that Court directed to the Sheriff of York. Upon which the Sheriff ſeiſes the ſame goods in the County of York, and delivers them to the Defendant in ſatisfaction of 20 l. and ſo Juſtifies, &c. And upon that it was demurred and adjudged for the Plaintiff for two cauſes.

1. Firſt he juſtifies by reaſon of a fier. fac. upon a Recovery in the Kings

Kings Bench, and does not ſhew in what Country the Kings Bench was. For that Court is removeable; And for that, all proceſſe are to appear coram nobis ubicunque fuerimus in Anglia.

2. The trover and converſion is ſuppos'd to be in the County of Nottingham, and the Defendant pleads ſpecial Juſtification in the County of York, without taking any traverſe abſque hoc that he is guilty in the County of Nottingham. Note by Fenner, that the Sheriff cannot upon a fier. fac. deliver the goods to the party in ſatisfaction of his debt. quod conceſſum.

Hall *againſt* Hemmſly.

HAll brought an action upon the caſe for words; and declar'd, That whereas he was robb'd of certain cloth, per ignotos, &c. The Defendant in prælentia diverſorum malitioſè dixit, H. hath receiv'd again 3 pieces of his cloth, and beareth with the thief, innuendo quendam malefactorem ignot. Adjudg'd, that the words were not actionable, for the receipt of the cloth may be lawfull; for he doth not ſhew that he knew them to be his cloaths. So 29 Eliz. intr. George & Parker. Adjudg'd for ſaying H. hath broken my ſhop, and taken away my goods, no action lies. Alſo there was another exception taken, that the Declaration is, in præſentia diverſorum that may be ſayd, and yet no ſlander, for it may be in their preſence, and yet they not hear it. But that exception was waived, for it ſhall be intended that they heard it alſo. Tr. 38. Eliz.

Harrington *againſt* Wyſe.

AN action of debt was brought for rent upon a leaſe, &c. And it was found in this manner, Articles of agreement were ſealed and delivered between the parties in hæc verba, It is covenanted and agreed that the Plaintiff doth let land to the Defendant for 5 years, from and after the Feaſt of St. Michaell next, Provided, and it is agreed, that the Leſſee ſhall pay therefore yearly at 2 Feaſts of the year, (viz. ſuch a time, and ſuch a time) by even and equal portions, 120 l. And there is another covenant, that a leaſe ſhall be made and ſeal'd before the Feaſt of All Saints next, According to that agreement. And if that may be ſaid a leaſe or a reſervation or not was the queſtion. By ſome it was ſaid, that that laſt Covenant, that the Leſſor ſhould make a leaſe according to thoſe Articles declares the intent of the parties, that thoſe Articles ſhall not be a leaſe. The Court on the contrary. For by the Articles the leaſe is to commence at Michaelmas next, and by the Covenant he may make the leaſe at All Saints, which is after the firſt leaſe commenc'd. So it appears that that was but for further aſſurance, and not to deſtroy the leaſe precedent. Alſo by the Court, that the Covenant, that the Leſſee ſhall pay yearly, &c. makes a reſervation by reaſon of the word yearly. But by Poph. that is a good reſervation alſo, omitting the word yearly. And that Proviſo (it is covenanted) makes as well a Covenant as a reſervation. But adjudg'd for the Plaintiff. M. 37. 38 Eliz. Rot. 226.

Willoughby *againſt* Grey.

A Venire brought, and the teſte out of the term (viz.) after the term ended. If that be error or not, was the queſtion: It was ſaid by the Court that that was not error. And the diverſity is between original and judicial Writs. As 1 Eliz. Dyer 168. 2 & 4 Mar. Dyer 129. Popham. That it is not ayded by the Statute being after verdict. Afterwards a

Caſe between Moulton and Hall adjudg'd that term was vouch't. The venire fac. boꝛe teſte beforꝛe the appearance of the Defendant in Court; And it was rul'd to be naught, the Court ſaid that that was not like our Caſe, So Judgement was affirm'd, Another errour was aſsign'd, Becauſe the writ of Habeas corpus ibi nomina, omitting Jurat. But it was not allow'd.

Criſpe *againſt* Fryer.

THe Lorꝛd of a Mannor comes upon the Land of a Coppyholder to demand his Rent, and becauſe none was there to pay it he enters foꝛ a foꝛfeiture. Fenner ſaid, his entry was not lawfull: But otherwiſe it had been if the tenant had been there and made an expꝛeſſe denial; And ſo the diverſity is between a negligent fault, and a wilfull. ve. 31 H. 8. Greenleſſees Caſe. Popham and Gaudy, were ſtrongly of the contrary opinion; and ſaid that a denial in Law was as much as an expꝛeſſe denial. As if the tenant had been there pꝛeſent at the time of the demand, and had ſaid nothing: that ſilence with a non-payment is a foꝛfeiture; ve. 42 E. 3. 5. The Lorꝛd enters foꝛ a foꝛfeiture becauſe the Coppyholder would not pay the Rent. Alſo it was agreed by all the Juſtices. 22 Eliz. in Sir Chriſtopher Hattons Caſe, That if the Coppyholders do not come to the Court of the Lorꝛd after a particular ſummons made to their perſons, That was a foꝛfeiture without any expꝛeſſe refuſal to come. Alſo by Popham. That the Lorꝛd might avow upon the Coppyholder. And 6 R. 2. Avowry, 86. Mich 36, 37 Eliz. C. B. Vaughams Caſe Ergo; Becauſe he had another remedy he ſhall not enter foꝛ a foꝛfeiture. See the ſame reaſon 4 Eliz. Dyer. 211. To which it was anſwered, that that was no reaſon; Foꝛ ſo in Sir Chriſtopher Hattons Caſe afoꝛe vouch't, the Lorꝛd might avow foꝛ the not doing of ſute of Court, yet he might enter alſo. Quære.

Sherriff *againſt* Diggs.

AN action of treſpaſs of an aſſault and battery was bꝛought. And the Plaintiff declares, quod cum the Defendant die et anno, &c. the afoꝛeſaid Plaintiff verberavit et vulneravit, &c. and upon that the Plaintiff recover'd. And now errour is bꝛought and aſsign'd in the Declaration; In that, that there is not any direct affirmation that that the Defendant verberavit, &c. But it is quod cum verberavit. Clerk. The courſe of the common Bench is to declare (the Court being willing to be informꝛm'd by the Pꝛothonotaries), in debt with a quod cum, &c. The Court like't the difference well; and ſaid, certainly that ſuch a declaration in Treſpaſs cannot be good. So the Judgement was reverſ'd. ve. Buckleys Caſe, Plowd. 128.

Sir Humphrey Ferres *againſt* Wignoll.

AN action of debt was bꝛought foꝛ taking an hoꝛſe. The Defendant pleads that the now Plaintiff was auter foits barr'd in treſpaſs foꝛ the ſame thing. And by the Court that is a good Plea. And Judgement given againſt the Plaintiff. Foꝛ that barr by Judgement amounts to a releaſe in Law; o, otherwiſe ſutes would be infinite. ve. 29 H. 8.

Wooddye

Wooddye *againſt* Coles baylye of Southw.

AN action of treſpaſs was brought for taking goods &c. The Defendant ſaid that a recovery was had againſt the Plaintiff in Southw. upon which a fieri fac. was directed to him, by which he took the goods and ſold them. By Popham. If a fieri fac. for 20 l. be awarded to the Sheriff, upon which he takes an entire Chattell and ſells it for 40 l. and returns the fieri fac. with the 20 l. in Court, he may detayn the Surpluſage until the Defendant comes to demand it of him; For he is not bound to ſearch the Defendant. Agreed. But by Gawdy. If a fi: fac. be awarded for 40 s. by force of which the Sheriff takes five oxen, every one at the value of 5 l. and ſells them all. It is clear that the Defendant ſhall have an action of treſpaſs againſt the Sheriff; Which was agreed.

Hart *againſt* Amerideth.

ERrour of reverſing a fine levyed by non-age, &c. and after he came to full age before that the fine was reverſ'd, and now it was ſaid that the fine could not be reverſ'd, becauſe the Plaintiff had levyed a fine of that Land to another. Poph. Then he hath extinguiſht his title of errour. Gawdy on the contrary. Cook, If the Diſſeiſee levy a fine to a ſtranger, the Diſſeiſor ſhall have the benefit of it, Popham agreed. And it is the Caſe in effect, Between Zouch and Bamfield. Fenner accorded. Cook ſaid the reaſon of that Caſe was the Statute of fines. Fleming, That is not to in queſtion. For the ſecond fine is not pleaded by the Defendant in the writ of errour: and ſo non conſtat, if there be ſuch a fine levied after that fine or not. By the Court. Then the Caſe is clear, and ſo it was adjudg'd, quod finis reverſetur. Note, it was ſaid that that ſecond fine cannot be pleaded, becauſe it was not yet ingroſſ'd; And the ingroſſer was ſtaid on purpoſe by the Counſel.

Harwood *againſt* Hamond
Trini. and Hill. 39 El.

AN action upon the Caſe was brought. And Counts, that in conſideration the Plaintiff delivered to the Defendant ten quarters of Malt, to the proper uſe of the Defendant, he aſſum'd to pay to the Plaintiff ten pound, and upon non aſſumpſit pleaded it was found for the Plaintiff. And now it was moved in arreſt of Judgement, that in that caſe an action of debt ſhall lye, and not that action. Which was granted by the Court. And Walmſly cited 21 E. 4. That a delivery of goods ad uſum ſuum proprium, is a gift, and by conſequence alſo it is a ſale. Wherefore it was adjudg'd againſt the Plaintiff.

Lovelace *againſt* Reynolds.

AN action of treſpaſs was brought, quare clauſum fregit: the Defendant preſcribes to have Common in the place, &c. and it was found, that the Defendant had uſed to have the Common paying a penny yearly to the Plaintiff, and if that iſſue is found for or againſt the Defendant was the Queſtion. And adjudg'd againſt the Defendant.

1. The preſcription is intire, and the payment of the penny is parcel of that, and ſhall be intended as ancient as the Common is. Note the Caſe between Brigandine and Weſtan before Sir Thomas Gawdy at the aſsize in Kent, Where one preſcribed to have a way to the Church; And

it

it was found, to have a way, paying every year to the terre-tenant 2 d. and a pair of gloves for every one that he should marry out of his house.

2. If that payment be not theirn by the Commoner, the Lord shall have no remedie for it. For he cannot have an action of debt, nor shall he distrein for it: without it be by prescription. As 26 H. 8. cap. 3. that payment cannot be a rent; For a rent cannot be reserved out of a Common, Office, or other thing which lies not in demand, in which an Entry may be made; Unless it be out of a Penualty, as 1 H. 4. and that by the possibility of Escheat. Note the case in Trin. 36 Eliz. between Gray and Fletcher. A Copyholder prescribes to have Common in his Lords land, And it was found that he had the Common accordingly, and it was likewise found in that manner; that the Copyholders have us'd to pay to their Lord pro eadem communia, unam gallinam & 5. ova yearly. And there, that the tenant hath well alleg'd the prescription, without shewing the payment, &c. And note, that there were two prescriptions, the one by the Commoner, the other by the Lord. By which it was sufficient for the Commoner to allege his own prescription.

DEbt reserved upon the Lease of a Warren of Conies. The Defendant pleads that the Plaintiff had plowed a field, parcel of the Warren, by which the Conies had not sufficient pasture. By the Court (absent Anderson) That it is no plea. For it is not a rent, but a Deniory in grosse, due by reason of the contract: by which the entry or user of that part is not any suspension.

Hargraver *against* Arden.

Trin. 38. Eliz. rot. 1117. Adjudg'd still. 39 Eliz.

ERrour upon judgement given in a replevin, was assign'd; Because the plaint was entred Thom: Harg. and Ambrose Arden, and the Recordare that remov'd the plaint into the Common Bench, was according to the plaint; But the Declaration in the Common Bench was Thom. Harg. against Ambrosin Arderne, and according to that Declaration were all the proceedings in the Common Bench, and the writ of inquiry of damages was Arderne. So the variance was between Arden and Arderne. But by the Court (absent. Poph.) That a variance between the plaint and the Declaration in the Common Bench is not error. To which purpose Gaudy vouch't 21 E. 4. fol. 6. where a plaint in the County is of 2 Oxen, and that is remov'd into the Common Bench; And there the Plaintiff declares of one Ox only, and the avowry was made of 2 Oxen. And notwithstanding the variance between the plaint and the Declaration in the Common Bench, yet the avowant had Judgement to have a return of 2 Oxen; And no fault in the Recordare or Pone shall abate the plea, when the plaint is remov'd: For they are determined by the remover into the Court. As 3 H. 6. fo. 1. So the first Judgement affirm'd.

Greedly *against* Whitcott.

38, 39 Eliz. rot. 464.

GReedly sues a plaint in the Court of Ludlowe and Wales, against W. Whitcott qui tam pro Domina Regina, quam pro seipso. And complains upon the Statute 5 Eliz. For that, that the Defend. had us'd the Craft of a Taylor, not being an apprentice to the Occupation. The plaintiff had judgement, upon which errour is brought in the Kings Bench and assign'd, because by the Statute of 18 Eliz. it is enacted, That all suits upon

upon penal Statutes, ought to be by original writ; Now this ſute is by none of them, but by plaint. And by the Court clearly, that it is errour. Alſo the Statute 18 Eliz. is a general Law, of which the Court ought to take notice. So the firſt Judgement revers'd.

Wolfe *againſt* Meggs.

IN an action of debt upon an obligation of 16 l. and declares to the damage of 10 l. The Defendant pleads Non eſt factum, and it is found againſt him: and the Jury gives the Plaintiff damages, and 40 s. coſts; So the Plaintiff had Judgement to recover the 16 l. and 9 l. for the coſts, and damages aſſeſt by the Jury; Moreover 4 l. pro incremento aſſeſt by the Court. And upon that errour was brought in the Kings bench, which was aſsign'd in this. Becauſe the Plaintiff had Judgement to recover 13 l. for coſts and damages, when he declar'd but to the damage of 10 l. and the damages and coſts ought not to exceed that which the Plaintiff hath alleged. But that ſhall not bind the Court as to the increaſe of coſts above that which is given by the Jury. So the Judgement was affirm'd. ve. 13 H. 7. 26. 2 H. 6, 7. *T. 37 Eliz. rot 1063. B. R.*

Raynor *againſt* Griviſton.

A Caſe was adjudg'd 39 Eliz. Hill. and affirm'd upon errour in the Exchequer-chamber, viz. An action upon the caſe for ſaying, That he was perjur'd, and would prove him ſo by two witneſſes; without ſaying in what Court he was perjured. And yet the words adjudged actionable. *H. 38. Eliz. rot. 944.*

Dureinge *againſt* Kettell.

D. brought an action againſt K. after a tryal by verdict in London. And it was ſaid in arreſt of Judgement, that the venire fac. is. Regina Vicecomitibus London ſalut. Præcipimus tibi, &c. where it ſhould have been Præcipimus vobis; But by the Court, the venire fac. being as it were a judical writ, that ought to enſue the other proceedings, And it was held to be amendable; and ſo it was. *M. 38. 39. Eliz. rot. 449.*

Gower *againſt* Capper.

AN action upon the caſe, upon an aſſumpſit. And the Plaintiff declares, That whereas the Defend. was indebted by bill to the Plaint. in 20 l. in conſideration that the Plaintiff faithfully promiſe'd to deliver the ſaid bill to the Defendant. The Defendant ſuper ſe aſſumpſit, to find two ſufficient ſecurities to enter into bond to the Plaintiff for the payment of the ſaid 20 l. And in Fact ſaith, that he delivered the aforeſaid bill to the Defendant, &c. and he procured two to be bound for the payment of the ſaid 20. l. who were not of any worth or value, &c. The Defendant by protеſtation, non cognoſcendo aliqua in narratione, &c. for plea ſaith, That the aforeſaid Plaintiff had not re-delivered the bill of 20 l. And upon that demurs in Law; And adjudg'd no plea. For the Declaration of the Plaintiff, That he had re-delivered the bill, &c. was ſurpluſage, and vain. For the Defendant cannot traverſe that, becauſe the Conſideration is not that he ſhall deliver, &c. but that he promiſ'd to deliver. So there is a reciprocal action given to either party. If the other does not perform his promiſe; and notwithſtanding that the Defendant had found two ſureties, yet becauſe the Plaintiff had aver'd *M. 38, 39 Eliz. rot. 111. B. R.*

that they were inſufficient, and that is confeſſed by the Defendant in his plea in barre; It is all one, as if he had not found any ſurety. And ſo adjudg'd.

Patridge *againſt* Emſon

Hill. 35. Eliz. B. R.

An action upon the Statute 1. 2, M. For driving diſtreſſes and impounding them in ſeveral places: ſo that the owner was put to ſeveral Replevins, and it was againſt 3 Defendants, and upon Not guilty it was found for the Plaintiff, and 40 s. damage aſſeſt by the Jurors againſt every Defendant ſeverally, And Judgement was given for the Plaintiff, that he ſhould recover the penalty of the Statute, (viz.) againſt every one 5 l. and for damages againſt every one 40s. trebled. Upon which a Writ of errour was brought, and errour aſſign'd, was in the point of the Judgement. (viz.) becauſe the damages and the penalties are ſever'd: (viz.) Every Defendant by himſelf, where it ought to have been jointly, (viz.) all one. And that was adjudg'd errour, and the firſt Judgement reverſed. For but one 5 l. ſhall be inflicted upon all the Defendants, and not ſeveral 5 l. by the Statute; Yet the words are, that every perſon offending, ſhall pay 5, l. but the meaning of the Statute is that the penalty ſhall be referr'd to the offence, not the perſons, then becauſe there was but one offence in all the Defendants, there ſhall be but one 5 l. forfeited. So by Popham. If two diſtreyn, and they alike drive the diſtreſſe, there ſhall be only one action, and one penalty, which was granted. So by Gawdy. Upon the Statute that enacts, that every one that ſues in the Admiralty, for a thing done upon the land, ſhall forfeit 10 l. There if 2 commence an action, contra formam Statuti, yet but one 10 l. ſhall be forfeited. So upon the Statute of 5 Eliz. of Forgery againſt 20. but one double damages ſhall be given againſt all. And by Popham and Fenner. That where 20 are ſo jointly ſued, a releaſe to one ſhall diſcharge all. But by Fenner: If the Plaintiff had brought his Action againſt them ſeverally, every one ſhould have paid 5 l. Sed quære.

Smith *againſt* Woodſtock.

Paſ. 39 Eliz.

Two men ſubmit them to the arbitrament of A. of all actions and Controverſies between them; Ita quod, The ſaid award be made by ſuch a day. Afterwards the Defendant in conſideration of 12 d. aſſumes, that if he do not perform the award, he would pay the Plaintiff 100 l. Afterwards the arbitrator awards, that the Defendant ſhould deliver certain cloaths and apparel to Smith the Plaintiff, which the Defendant hath not performed. Whereupon the Plaintiff brought an action upon the Caſe upon an aſſumpſit, and adjudg'd that it doth not lie, Becauſe the Arbitrament ſo being conditional, with an Ita quod, &c. It ought to have been made for all quarrels, &c. according to the ſubmiſſion. But if the ſubmiſſion had been general of all quarrels between them, without any ſuch clauſe, ita quod, &c. There the Arbitrator had had abſolute authority, and then if the award had been made but of a part, it is good for that part, and ought to be performed. So ſee the diverſity in the caſe. Gawdy denyed. 7 H. 6. 40. 40. to be law. 4. Eliz. Dyer 216. 8 Eliz. Dy. 241. 19 H. 6. 6 and 10. 2 R. 3. 18. And Judgement was given quod querens nil. cap. per bill. By Popham. Such an aſſumpſit, as above ſaid, was before the Arbitrament; and after an avoid award is made, he is not bound to perform it: Otherwiſe it is of ſuch an

an aſſumpſit made after ſuch an arbitrament; For there volenti non fit injuria.

Edwards *againſt* Stapleton.

AN action upon the caſe was brought by an Executor upon a promiſe made to the Teſtator; and the Executor in the end of the plea omits this clauſe. Et profert hic in Cur. literas teſtament. And that was aſſign'd to be erroneous, and for that it was prayd to be reverſed in a writ of error. The Court accordingly, So the Judgement was revers'd. *Mich.* 38, 39 *Eliz. rot.* 470.

Ile *againſt* Surlinge.

ERror was brought upon a Judgement in the Common Bench, in a writ of Covenant; And it was ſaid that the courſe of the Court is, That if a man brings a writ of Covenant, or other action in the Common Bench, and layes his action in Middleſex, and Middleſex is writ in Margent: If the Plaintiff in his Declaration ſhews that by his Deed covenanted, &c. that is good enough without ſhewing in what place the Covenant was made; for it ſhall be intended to be in the ſame County where the action is brought. *T.* 39. *Eliz. rot.* 978.

2. It was aſſign'd for errour, Becauſe the Plaintiff had aſsign'd three Covenants to be broken, and the Jury aſſeſſe damages ratione fractionis coventionis to 10 l. So that the damages are aſſeſt only for the breaking of one Covenant, in the ſingular number, and there is not ſhewn for what Covenant. Gawdye. That is no errour; For the damages ſhall be intended to be aſſeſt for every Covenant by him broken: So the damages goe intirely for all the 3 Covenants broken, regarding every one ſeverally by it ſelf, to be broken. So the firſt Judgement confirm'd.

Webb *againſt* Poore

AN action upon the caſe was brought for ſlander, in hæc verba: I (innuendo) the Defendant, will call him (innuendo) the Plaintiff, in queſtion for poyſoning my Aunt, and I make no queſtion but to prove that he hath poyſoned my Aunt. And upon not guilty, it was found for the Plaintiff, and damage aſſeſt; And in arreſt of Judgement it was mov'd that the action does not lie; Becauſe by thoſe words no expreſſe affirmance is laid to the charge of the Plaintiff. The whole Court on the contrary, and that the action is mainteinable, and that without averrement of the death of his Aunt; Becauſe one may be poyſoned, and yet he may not dye. So it is not like Snagge's caſe of Murder. For it is impoſsible for a man to be murdered and he not die. So Note the diverſity. 39 *Eliz.*

Roſciter *againſt* Buſſey.

AN action of debt was brought in the Common Bench: And in the firſt Declaration, before appearance, the Plaintiff declares upon an Obligation made by the Defendant, and does not ſhew where it was made; but leaves a ſpace for the place and County. Alſo he counts that the Defendant ſummonitus fuit ad reſponden. the Plaintiff in 10 l. quas, &c. Et unde the Plaintiff ſays, quod cum, &c. and does not ſay unde the Plaintiff, in his own proper perſon, or by his Atturney ſays, &c. And the Defendant to that imparl'd, and after appear'd, and then the Plaintiff declares de novo, & makes the 2 Declaration in all things *M* 38, 39 *Eliz. rot.* 197.

certain; And upon that had Judgement to recover. Now error was brought to reverſe that. And Fenner was mov'd by a Prothonotary, that it was the courſe of the Common Bench: That the firſt Declaration is that upon which the Judgement is given, and it is an exemplar of the ſecond: And if that be naught, although the ſecond be good, yet it is incurable. So Judgement was that the firſt Judgement ſhould be reverſed.

Parrett *againſt* Carpenter.

IN an action upon the Caſe; That whereas he is Parſon of D. a Preacher, the Defendant ſlandered him in hæc verba, Parrett is a lewd adulterer, and hath had 2 children by the wife of I. S. I will cauſe him to be deprived for it. By the Court the action does not lie; For the ſlander is to be puniſhed in the ſpiritual Court. And ſo awarded, quod quer. nil. cap. per bill.

The Lady Digbyes Caſe

THe Lady Digby Exec. to port treſpaſſe 2 Counts of her own poſſeſſion, &c. And it was mov'd becauſe the Plaintiff was non-ſuited; If the Defendant ſhall have coſts upon the Statute of 23 H. 8. By the Court. The Plaintiff ſhall render coſts. For ſhe did not uſe the action as Executrix; but of goods taken out of her own poſſeſſion, And ſo the naming her executrix is nothing to the purpoſe. Ergo within the Statute.

Thimmelthorps Caſe.

AN action upon the Caſe was brought for this ſlander, He is a bloud-ſucker, and not worthy to live in a Common wealth, and his child not born is bound to curſe him. By the Court no action lies.

Broughton *againſt* Randal.

FAther, tenant for life, the remainder to his ſon in tayl, the remainder to the right heirs of the Father. After the Father and ſon at a certain time were attainted of felony, and executed likewiſe at one time, the ſon not having any iſſue of his body. If now the Father ſhall be ſaid to be ſeis'd of an eſtate in Fee, that Dower, &c. was the matter. And there becauſe it was prov'd by witneſſes that the Father mov'd his feet after the death of the ſon, It was found by the Jury, ſeiſie que Dower, &c. And upon that the Wife of the Father had Judgement to recover. Note after errour was brought, and the error aſsign'd in the proceſſe. vet. Tr. 38 Eliz. rot. 876.

Garrard *againſt* Soule.

Intr. M. 37. Eliz. C. B. rot. 1149.

A Deviſe was to A. and his heirs. And if he die without iſſue, that then it ſhall be to B. C. and D. or the ſurvivors of them. Adjudg'd, that that is an eſtate tayl in A. ve. 37. Aſſ.

The Counteſſe of Warwick *againſt* the Biſhop of Lichfield.

THe Condition of an Obligation was, that if A. pay 15 l. at Michael. mas next, and 15 l. at P. after, ſo 15 l. at every of the ſaid Feaſts ſo long

long as A. ſhall live, or until B. ſhall be preferr'd to a benefice of 30 l. per annum. In an action of debt upon that Obligation, The Defendant pleads that B was preferr'd, &c. before Michaelmas next. And held no plea upon a demurrer; For take it which way you will, he ought to pay the 15 l. at the ſaid two Feaſts, that are expreſſy ſet down; For they are abſolute, and ſo adjudged without argument.

VPon evidence to the Jury. By the Court, That a leaſe for years of a Manor, except one acre: that that exception extends to the entire eſtate, and is not determined by the death of the Leſſor or Leſſee. But by Walmſley, It hath been a queſtion, if an exception hath been expreſſy to the Leſſor, that ſhould determine by his death. The action was for arrearages of rent, and the Defendant pleads entry in one acre of land demiſed; And in evidence given, it was entry in one acre of wood. And by the Court, that ſhall not maintain the iſſue. P. 39 Eliz.

Feerby *againſt* Lorkings.

L. aſſumes to F. quod dimitteret to him a Parſonage, and two months after he leaſes it to him for years; And by the Court, that it is well as to the time; For it ſhall be intended within reaſonable time. But by Beomond and Walmſ. That it ought to be a leaſe for life. Anderſon on the contrary. For the Aſſumor hath election what eſtate he will make. But they all agreed upon a difference. But if it had been by way of Covenant, there the Covenanter ſhall have the election: For by the grant the thing and eſtate is executed; but the Covenant is executory. And the action was for non-performance.

Whitley *againſt* Beſt.

VV. brought a writ of Dower againſt B. C. leſſee for years by leaſe of the husband rendring rent, was before the coverture prayed to be received for his term. The wife recovers, and had Judgement. By the Court, the leaſe of C. is ſaved, by 21 H. 8. cap. 16. And the Court adviſ'd, that an habere fac. ſeiſinam ſhall be awarded to the Sheriff to put the wife in poſſeſſion, with a proviſo, quod ten. ad termin. annor. non expellatur. And Beomond ſaid, that 3 Eliz. ſo it was ſaid. Rul'd in Dower brought by the mother.

Servien *againſt* the Biſhop of Lincoln.

IF the Incumbent reſign and the uſurper preſent, within 6 moneths, and is in for 6 moneths, no notice being given at the reſignation; yet that ſhall bind him, and he ſhall be put to his Right of Advoiſon. Otherwiſe if the Ordinary had collated, Becauſe the induction is notorious to the Country, And the Patron ought to take notice of it at his peril, to prevent the uſurpation by an Eſtranger.

R. marries the widdow of Terrill, who died inteſtate, and divers goods came to the hands of R. Adminiſtration is committed to B. and R. accounts for the goods to B. and pleads that in barre in an action of debt brought againſt him, as Executor in his own wrong, and intermedling, ve. 5. rep. 34.

Cooke *againſt* Bromehill.

P. 37 *Eliz. C. B. rot.* 1437.

A. leaſes for life to B. and afterwards levies a Fine to the uſe of R. for life, the remainder to A. in fee: with a proviſo or power to make Leaſes for 21 years, or three lives; And that the Conuſees ſhould ſtand ſeis'd to ſuch uſes. And afterwards A. covenants to ſtand ſeis'd to the uſe of P. in tayl, with divers remainders over: And after A. grants the reverſion aforeſaid to L. for life, who diſtrains C. and avows, And Judgement was given againſt the Avowant.

1. Becauſe by the covenant to L. A had deſtroyed his power to make leaſes, &c.

2. The pleading was naught, Becauſe he pleaded that by grant of reverſion. prædict. which was limited to A. himſelf in fee upon the fine; for he ought to have pleaded that, as is by the limitation in the Indenture. So if the reverſion be by bargain and ſale, or if it be by way of releaſe; If that be pleaded as by grant, that is naught.

Oſmand and his wife.

A. Leſſee for life, the remainder to B. in Fee. A. ſurrenders upon condition to B. and enters for the condition broken. B. dies, and his wife brought Dower againſt A. and the iſſue is joyn'd upon ne unq. ſei. q. Dower, &c. That ſhall be found againſt A. ve. Dy. 41. And by the Court, If a man bargain and ſell his land in fee, by thoſe words only, and makes livery, that yet the bargainee, although that the Indenture was never inroll'd, may plead that. For a bargain includes a grant.

The Biſhop of Glouc. & al. *againſt* Veale.

M. 39, 40 *Eliz. C. B.*

VEale recover'd in a Quare impedit againſt them, and had Judgement to have a writ to the Biſhop. And a writ of enquiry of damages iſſued. Now the Defendants brought errour. And by the Court, that writ ſhall abate, becauſe Judgement is not given upon the entire records; and that a writ to the Biſhop ſhall not iſſue, till the writ of enquiry of the value be return'd; Unleſs the Plaintiff releaſe the damages. And that by the Court and all the Clerks.

Reeve *againſt* Cox.

IF an Ejectione firm. upon a demurrer, the caſe was thus. A. gives to the eldeſt brother in tayl, the remainder to the youngeſt brother in tayl; the remainder over to B. in fee. The eldeſt brother leaſes for three lives, according to 32 H. 8. with warranty, and dies without iſſue; which deſcends upon the younger brother, who enters and leaſes to R. for years. And it was reſolv'd, that the entry of the younger brother was lawful, and not hindred by the warranty: For the remainder was not deveſted, becauſe that Leaſe was not a diſcontinuance. P. 40 Eliz. For the Plaintiff.

Godbolt *againſt* Mallet.

BY the Court, That if the husband ſeis'd in Right of his wife, pleads, that he and all thoſe whoſe eſtate they had, have us'd to have a Common appendant, That that is naught, for the Eſtate is in the wife,

wife. But he ought to have pleaded, that he and his wife, and thoſe whoſe Eſtates the Wife hath, or whoſe Eſtates they have, have it.

Endenne *againſt* Feviſame.

WAſter delivers one hundred muskets into the Tower, and the debenture for that, was by conſent of both parties made to H. as if he had delivered them. W. dies making F. his Executor: and Hopkins ſurrenders that debenture, and a new one was made to F. And it was agreed by the Court, that the money was not aſſets in the hands of F. for it was only of truſt and confidence between W. and H. and there is no remedy but in the Chancery. But note well 12 Iac. C.B. Harronet againſt Reynolds. R. as Executor, recovers 1008 l. in Chancery againſt F. that had leaſed for years in truſt for the Teſtator. And that was adjudg'd to be Aſſets. Et quær. what difference.

Rotheram *againſt* Green.

IN an action of treſpaſs againſt G. he juſtifies becauſe of a Common appendant by preſcription, in 500 acres. And it was found by verdict that the Anceſtor had releas'd his Common in five of theſe acres.

1. And by the Court he had laſt in preſcription.

2. The Common by that is not extinct, becauſe it is diſcharg'd to be common by act of Parliament for ſayler of preſcription ve. Dyer 164. a. 284.

Flowers Caſe.

A. borrowed one hundred pound of F. and at the day brought it in a bagg and caſt it upon the table before F. and F. ſaid to A. being his Nephew, I will not have it, take it you and carry it home again with you. And by the Court, that is a good gift by parol, being caſt upon the table. For then it was in the poſſeſſion of F. and A. might well wage his Law. By the Court, otherwiſe it had been, If A. had only offer'd it to F. for then it was choſe in action only, and could not be given without a writing.

Suſans *againſt* Turner.

IF a ſuit be in the Admiral Court, for a contract ſuppoſed to be made ſuper altum mare, The Defendant upon a ſurmiſe that it was made upon the Land within the Realm, may have a prohibition. And that it may come in iſſue if it was upon the land or upon the Sea. But by the Juſtices, their rule is, that upon ſuch a ſuggeſtion they ſhall not grant a prohibition after ſentence paſs'd.

Beum *againſt* Felton.

AN Ejectione firm was brought of 50 acres of Land. 10 acres of meadow, 100 acres of Paſture And the Jury found the ejectment only in 2 Cloſes, called black acre and White acre parcel of the ſaid Lands, And by the Court the verdict is naught, and that the Plaintiff ſhall have another Judgement; For the Judgement ought to be according to the Declaration of the Plaintiff, and his demand: and it does not appear of how much

much execution may be made, Alſo it may be that thoſe two Cloſes conteyn more, than was in the Declaration; And by the Court a venire fac. de novo was awarded.

Counteſs of Warwick *againſt* the Lord Barklye

By the Court. That in a writt of Partition no damages ſhall be recovered, nor an enquiry for them; And yet the writt and the Count is ad damnum, &c. N. B. 61 H, E. 3. 57. 3. E. 3. 3. 47. partition. 11.

Beſtwick *againſt* Camden.

Intr. P. 19, C. B. rot. 15. In a Quod permittat in Nuſance, quod levavit quandam molem (Anglice) abay, by which, &c. the water-houſe of his mill was ſtopped. And it was ſaid by the Court that the writt ſhall abate; Becauſe moles is an Equivocal term, and is not proper for a brook or bay.

Note by all the Juſtices. Two Executors bring an accompt againſt B. and have Judgement quod computet; And after one of them dies, yet the writt ſhall not abate: But the Survivor ſhall have a ſpecial ſcire fac. ad computandum. in his own name, reciting that the other is dead.

Tiſdall *againſt* Bevington.

That maintenance does not lye, for maintenance in the Spiritual Court, nor by 32 H. 8. nor by 1 R. 2. cap. 4. And that ſo it was adjudged in one Conſtantines Caſe

Minors *againſt* Bocher.

Intr. 39 Eliz. C. B. rot. 1615. In debt upon an Obligation. There was an attachment by the cuſtome of London taken againſt one, before the day in which the Obligaon was payable. But note that cuſtome ought to be ſo alleg'd, yet judgement was againſt the Defendant, for two other cauſes, as Bar. Heron reports.

Burley *againſt* Read.

B. brought ſome yarn on Horſeback to the Houſe of A. his Neighbour, for to weigh it upon his ſcales and beames, And the Lord comes and diſtreyns the Horſe and yarn for rent arrear by A. And by the Court that is not lawfull. For they were brought thither for another intent. 7. H. 7, 10 H. 7. 22. 22. E. 4. Alſo they were in the poſſeſsion of the very owner.

Ethrington *againſt* Aſhon and his wife.

E. Brought an action of debt againſt them, the wife being Executrix to the debtor, &c. The Husband comes in upon the Exigent, and prays his privilege, becauſe he is a Servant to the Lord Keeper But by the Court that he ſhall not have it; Becauſe the wife is joyn'd with him, and ſhe can have no privilege ve. Dyer 377, a. b.

Warner

Warner and ſtone and their Wives.

They bring an action of debt upon an Obligation, made to the wives when they were ſole, and averr that the mony was not paid to the ſaid Wives before the coverture, &c. And an exception was taken. Becauſe it is not ſaid nec alicui eorum. For it might be paid to one of them. But by the Court, that the Count is good enough, and that had been ſuperfluous. For payment to one of them is payment to all the Obligees.

Deeles *againſt* Nokes.

A Feme the Obligor of full age, takes a husband within age. And they in debt upon the Obligation pray his age. But the Court denyed it. See a good caſe in 8 E. 2. Age 125. Debt upon an Obligation. Where A. obliges him and his heirs againſt Baron and Feme, as heir to A. And they had age allowed, becauſe the wife was within age. And alſo 19 E. 2. age 182.

Robbins's Caſe.

R. brought debt againſt A. as Executor; And upon pene admin. and iſſue upon that, affetts are found, and Judgement for the Plaintiff. And upon a teſtat. Execution was awarded to the Sheriff in another County than where the tryal was, That Sheriff may return a nihil, and is not eſtopp'd by the verdict and Judgement; otherwiſe it is of the Sheriff of that County where the action was brought; For he cannot return a nihil, &c. but he ought to return a devaſtavit. ve. 9 H. 6. 9. Exec. 9.

NOte, in an action of debt againſt A. as Executor in his own wrong, He pleads ne unque Exec. &c. And it is found againſt him, and Execution by the Court againſt him for all the debt (viz.) 60 l. for his falſe plea, Although in truth he had not meddled but with one bedſtead of ſmall value. And it was ſaid by Daniel, that in 39, 40 Eliz. C. B. Kitchin *againſt* Dixon. That one Mr. Offlye for ſuch a falſe plea was charged to 100l. and he had medled but with one Bible. Therefore beware and plead well the ſpecial matter.

THere was a queſtion upon a Demurrer in law. If a lapſe devolves to the Ordinary, and within thoſe 6 months, the Ordinary is tranſlated to an other Biſhoprick: If the King or his Metropolitan ſhall preſent to that lapſe, in default that the Patron does not preſent. Noy Atturney, That the Warden of the Spiritualties ſhall preſent whoſoever he be; ve. Dyer 78. Pl. 103.

Tavernors Caſe.

THat an Obligation made to a Deputy of a Bayly of a Franchiſe, or to an under Sheriffs Deputy, is void, by 23 H. 6. For it ought to be in the name of the Bayly or Sheriff himſelf.

Deane and Chapter of Pauls.

DEbt was brought againſt them, for an eſcape ſuffered by their Bayliye of a Franchiſe, where they had the return of Writs. And adindg't

judg'd that it doth not lie against them, but against the Bayliye himself For the writ is directed to him (viz.) ballivo libertat. and not Dali &c. Also an Obligation according to 32 H. 6. ought to be taken in his name. Also for an ill return the Bayly is always fin'd. Note Dyer 278. Escape is brought against a Deputy Gaoler, because the Clause to make a Deputy was in Patent to the Marshal, Note 39 H. 6. 34 a:

Hollmasts Case.

By the Court that a Prohibition shall not be awarded to the Admiral, or Spiritual Court after sentence. Also that a plea was there pleaded and refused, which was tryable at Common Law.

Bold *against* Walters.

In a replevin. And the Title was by Lease made by a Parson; And the Avowry was. That A. was seis'd of the Rectory of H. and made the lease, without shewing that he was Parson. And by the Court; That that should have been a good exception, if it had not been said in Avowry moreover, that A was seised in jure Ecclesiæ, which supplyes all.

Russel and his Wife.

They joyn in a trover and conversion, for a Deed of a rent charge granted to the wife, dum sola fuit. And that the deed came to the hands of the Defendant after the coverture. And it was said by the Court that the action was well brought by them two; For the action shall survive; for otherwise a grand inconvenience would ensue to the wife. For if the Husband only should recover, and after die; his Executors would have execution for the damages, and not the wife, Judgement was given accordingly. T. 40 Eliz. C. B. 38 H. 6.

Colme *against* Frome.

It was said by the Court, That if an Offender be brought before a Justice of peace, the party ought to tender sureties, and it doth not behoove the Justice to demand it. But Owen said: That if the Sheriff takes one that is bapleable, There the Sheriff ought to offer to him, if he will be bayl'd: for the party is to pay 4 d. to the Sheriff by 23 H. 6. for making of the Obligation, To which Walmesly agreed.

Moyle *against* Moyle.

That destroying of Coneys, and stopping or digging up of Coney burroughs; Is not waste by the Lessee of a Warren. And so it was adjudg'd N. B. 87. a

Warneford *against* Giles

W. leases to G. for 21 years, if he so long live and continue in his service. W. dyes. And by the Court the lease is not determined, because it was the Act of God. So an annuity pro concilio &c. to the Grantee for his life, is not determined by the death of the Grantor.

Gascoynes

Gaſcoynes Caſe.

A. Acknowledges a recognizance of a ſtatute ſtaple, according to 38 H. 8. to G. And afterwards he enfeoffs many others of his land ſeverally of ſeveral parts. G. ſues execution againſt one only, returnable in the Chancery, as it is ſaid upon that ſtatute; and he that had his lands extended, brought an Audita querela in the Common bench. And it was mov'd by Daniell, that the Audita querela ought to have been brought in the Chancery; becauſe there is no record of it in the Common bench. But by the Court, It may be brought well enough in the C. B. And Williams vouch't M. 31. 32. Eliz. Claver and Mallacres caſe.

By the Court it was ſaid, That where any Statute, as 5 Eliz. for perjury, &c. limits any remedy by information for the party grieved. That ſuch an Informer is not within the Statute 31 Eliz. cap. 5. For that is intended of a Common informer. And by Anderſon, it was adjudg'd in the caſe of the Butchers of London, That if a man be an Informer, and is not the party grieved at one time, that yet he is not a common Informer. And it was agreed in one Holdens caſe of Coventry, That an Information (upon the 27 Eliz. of Fraudulent Conveyances) by the party grieved, after the year, &c. is good enough, and not within the Statute.

The Counteſs of Warwick *againſt* the Lord Barkley, iter.

A Writ of partition was brought, and Judgement, quod partitio fiet; And before that it was executed by the Country by the Sheriff, error was brought. And it was ſaid by the Court, That it does not lye, upon ſuch a Judgement: before that the partition be made and return'd by the Sheriff. And Judgement was given, quod partitio ſtabilis remaneat. For this is not like to other real actions, where errour lies before the habere fac. ſeiſinam be return'd. For that is a final Judgement, and no other to be given. Alſo there needs no return of an habere fac. ſeiſinam. For the party that recovers may execute his Judgement by his Entry, As Dyer 67. a.

Cawdrey *againſt* Kingſmill.

In a replevin the caſe was thus, A. deviſes to C. by theſe words, I deviſe a rent of 40 s. out of all my Lands in Hawley (with a clauſe of diſtreſs) payable yearly at the uſual feaſts, &c. And the deviſee avers that ſuch Feaſts were the uſual Feaſts in Hawley; and ſo advows, &c. And by the Court, that is a good deviſe of a rent-charge by theſe words, with a clauſe of diſtreſſe; Becauſe of the intent of the deviſor, of a remedy and means to come to that rent-charge. So, cum clauſula diſtrictionis, is the ſame with cum clauſula warrantiæ, which makes a warranty.

Streingsborrow *againſt* Beedlowe.

They were tenants in Common of a leaſe for years. And B. brought a partition upon the 32 H. 8. cap. 32. And the writ was general as in the Regiſter, with a ſecundum formam Statuti, which made it to be a partition, upon his caſe within the Statute, as the Statute limits and appoints. But it had not been good if that clauſe had been omitted. And it was ſo ruled in one Maurices caſe.

The Sheriff of Nottingham's Case.

AN Escape was brought against two Sheriffs, one dies; The Question was, If the writ shall abate. By the Court, In debt against two, the death of one abates the whole, but otherwise in trespasse, 21 E. 4. 1. 2 H. 7. 16. Because they are several misdemeanours. But the Court deliver'd no opinion in the first case. But by the Court this difference was agreed, That an escape upon an arrest, by the same processe, as a cap. ad respondend. &c. The writ ought to surmise, ad largum ire permisit, et non comparuit ad diem. Because the party was bapleable, and so the Sheriff might lawfully suffer him to go at large. But otherwise, if the arrest be upon an execution, as a cap. ad satisfac. there ad largum ire permisit, is good enough.

Note, P. 2 Jac. C. B. The Lady Mounson against the Sheriffs of Lincoln City, for taking of insufficient security, upon 23 H. 6. And the death of one of the Defendants did not abate the whole writ.

Buryes Case.

IN the Argument of Buryes case for a divorce, the 5 Rep. 98. There was cited 35 Eliz. B. R. rot. 605. That if a lay-man be made a Commissary by the Bishop, it is good, until it be undone by sentence; although that the Canon says, that he ought to be a Doctor or a Batchelour of Divinity. But 21 H. 8. hath limited that a Doctor of the Civil Law may be a Commissary.

Gregory *against* Olden.

IN debt upon an Obligation. It was said that it was made upon a Simoniacal contract for presentation to the Church, with the cure of souls; And so it was for Symony. All that was averr'd to be matter dehors. and not appeard within the deed; And for that the Plaintiff had Judgement. For no such averment is given by the Statute.

NOte that if a venire fac. be return'd without the name of the Sheriff endors'd; That is not ayded by the 18 Eliz. cap. 14. Because it is not any return; And the Statute remedies insufficient returns. And by Williams, that so it was adjudged. Trin. 40 Eliz. C. B. in Brownlowes Office. Sir Henry Darcyes case. And Brownlowe agreed to it, and by Daniel, That it was so adjudg'd in the Kings bench.

Britton *against* Barnet.

BRitton delivers money to B, to deliver to C. who does not so. Br. brought an action of debt against B. And by the Court well brought. And Glanvil said at St. Albans term, in a case between Dowse and Cawley. Dowse delivered money to C. to dispatch his business in the Exchequer, and he does not do it; and an action of debt was well brought for that, and so adjudg'd: And also in the Common bench, the Countess of Lincoln against Topcliff. T. makes a bill, testifying that he had receiv'd 7 l. of the Earl to buy hollows. But does not do it. And an action of debt in that case lies, and so 'twas adjudged.

Powel

Powell *againſt* Brazen noſe College in Oxon.

A Formedon in the diſcender was brought in a præcipe of 20 acres of land Luddington, and (in) was omitted: And rul'd, that it ſhall be amended, although it was a fault of the Curſitors, and not of the Judges or their Clerks of the Court, that being an original writ. And Williams who mov'd it vouch'd 48 E. 3. and 35 H. 6. 10.

Greene *againſt* Wallwin, or Wiſeman.

IN an ejectione firm. The Plaintiff counts that A. was ſeis'd &c. And of that Enfeoffed K. to the uſe of the Plaintiff, and that he was ſeis'd by 27 H. 8. deviſibus, &c. until the Defendants Leſſor entred, and does not ſay, (and him diſſeis'd) for the truth was, that ceſtuy que uſe, had not actually entred in the land. And if upon ſuch a ſeiſin by 27 H. 8. he may maintain an ejectione firm. was the queſtion. And the Court ſeem'd that he could not, For they adviſ'd the Defendant to demurr; for actual poſſeſſion is not in ceſtuy que uſe by the Statute. For he may diſagree to it. And by Walmeſly and Glanvill. That he may have an Aſſ. but not a treſpaſſe without actual poſſeſſion.

Dowman *againſt* Butter.

D. ſues B. upon a counterbond to ſave harmleſſe, and B. ſaid that the principal bond in which D. and he were obliged, was made upon an uſurious contract; And D. pray'd to avoid that by pleader. And Walmeſly ſaid, the Plaintiff ſhall recover. For that counterbond was made bona fide, and perhaps the ſurety was not conuſant of the uſurious contract, and then he cannot be, nor ought to plead that, as if errour had been in the firſt ſuit; yet the ſurety ſhall recover upon the counterbond, although that he takes no advantage of the errour. So if the ſurety had been an Infant, and had not pleaded nonage. And that counterbonds mentioned in the Statute 13 Eliz. are intended for payment of money, to him that lent the money, and not between him that borrows and the ſurety. Glanvil ſaid, that would be a dangerous preſident to avoid the Statute; for the ſurety may be a friend of the Uſurors, who will not plead the Statute in an action of debt brought againſt him; and ſo the Statute ſhould be to little purpoſe. But at length Judgement was given for the Plaintiff. Then Glanvill ſaid, that that Judgement will be quickly carryed to Cheapſide. Note, the ſaving harmleſſe is the ſubſtance of the counterbond, 5 Rep. 27. 18 E. 4. 27. *Tr. 40. Eliz. C. B. rot. 895.*

Thoroughgoods Caſe.

A. Recovered in debt, and had execution againſt B. The Defendant B. dies, and the Sheriff levies the money upon the Executors of B. And by the Court that was nought. For the writ was fier. fac. de bonis et catallis B. which cannot be after his death. But on the other part, if after execution awarded the Plaintiff dies: Yet by the Court the Sheriff may levy the money. And if he makes no Executors nor Adminiſtrators as yet made, The money ſhall be brought into Court, and there depoſited until, &c. Note Dyer. 76 b.

AN action upon the caſe for words was brought. Thou keepeſt an houſe of Bawdry. And held by the Court, that it lies, becauſe the words

are ſpoken in London, Where it was ſaid by Anderſon By the cuſtom there, ſuch that keep a bawdy houſe may be corporally puniſht, but not in other places. But by Glanvil, they may be put in Bridewell, or whipt by the Common Law for ſuch miſdemeanors. But by Anderſon, That is for breaking of the peace vi et armis. Alſo ſuch an offence is inquirable in the Leet.

NOte by the Court; Leſſor for years rendring a rent, acknowledges a Statute, and the reverſion is extended, And the Conuſee brought an action of debt for rent arrear, and well. But the Defendant ſaid that the Plaintiff is outlawed, and Iſſue is joyn'd upon null. teil. record. And the record was certified much varying from the Record of the Outlawry, as it was pleaded in diſability. And awarded that the party had fail'd of the Record. And 7 H. 4. j. was denyed for law by the Court.

Sucklinge *against* Coney.

VPon a ſpecial verdict, upon payment for a redemption of a mortgage, The Mortgager comes at the day and place of payment, and ſaid to the ſaid Mortgagee, Here I am ready to pay you (naming him) the 200 l. Which was of due money, and yet held it all the time upon his arm in baggs. And adjudg'd no tender; For it might be counters or baſe coyn for any thing appeared. Note 5 rep. 114, 115. And by Anderſon. It is no good tender to ſay I am ready, &c.

Veal *against* Reede.

V. brought a quid juris clamat upon a *Fine* againſt R. &c. as leſſee for life, R. ſaid that he was ſeis'd in fee abſque hoc, that he was ſeis'd for life only, and iſſue upon that: And it was found, That R. was tenant in tayl after poſsibility of iſſue extinct. And the queſtion was, for whom the iſſue is found, and for whom Judgement ſhall be given. Williams. For the Plaintiff, becauſe it is an eſtate for life privileg'd, and ought to have been pleaded in bar vc. 46 E. 3. 27. 15 E. 4. 28.

Vaughan *against* Paramore.

IT was adjudged that in falſe Judgement. All that are return'd by the Sheriff to be ſuitors at the Court baron, and preſent when the Judgement was given, ought to return the writ, and not all thoſe that ought to make ſute at Court. For by that means the party ſhall never have it certified, as it may happen. vc. N. B. 18 d. Dyer 262. 1 E. 5. 36. falſe Judgement, becauſe the Steward named in't. 6 rep. 11. The reaſon is, becauſe he is not Judge there.

Dobſon *against* Dugdale.

IN an action upon the caſe for words. Thou art a Cozener. The Plaintiff ſhew'd how he was an Officer, &c. and upon the evidence it appear'd that the Lord Treaſurer had made A. Deputy of the Bayliwick of Middleſex per hæc verba. I make A. my Bayly, &c. to exerciſe the office of himſelf, or his aſsign's, at the pleaſure and will of the Lord Treaſurer. And becauſe Dobſon was aſsignee, by A. with the conſent of the Lord Treaſurer, and by the Court the aſsignment is not good; For A. is but tenant at will: and he cannot aſsign over that; And the clauſe upon that was repugnant Upon which it was found by the direction of the Court againſt the Plaintiff.

Andrews

Andrews *againſt* Needham.

Intr. M. 40. & 41 Eliz. rot. 1. 21.

A. Leaſes for years, by Indenture. N. covenants to repair, &c. and to yeeld up all at the end of the term, But during that, one Blunt enters by an elder title. If the Leſſee be diſcharged of the Covenant to yield up all, &c. And it ſeem'd to the Court that he was. For if the Land be gone, the Obligation is diſcharged. ve. 20 H. 6. 45 E. 3. 8.

Davyes *againſt* Blunt and others

FAlſe judgement, for errour in a Antient demean, the writ de droit cloſe was of five meſſuages, and he makes proteſtation to ſue for five meſſuages in the nature of a writ of entry upon Diſſeiſin: and yet he enters his playnt, but for two meſſuages, and hath judgement for them only. And rul'd that it was errour. For the writ de droit cloſe, is their warrant, and that is the writ, and the playnt is the Count, which ought to be purſuant.

Conſtable *againſt* Clowbury.

CLow. fraights the wife of Conſtable, who covenants with Clow. That his wife ſhall go with the next wind to Calies; And Clow. covenants that if the wife ſhall go the intended voyage and return, &c. That he ſhould pay to Conſtable 300l. And the Plaintiff now in his Count, counts, that the Defendant non ſolvit, &c. but he does not ſhew nor averr that the wife did go with the next wind. The Defendant pleads a ſpecial Plea, and traverſe abſque hac, that the wife went with the next wind.

Intr. H. 1 Car. B. R. rot. 425.

Firſt, it was rul'd by the Court that the traverſe is not well; For the voyage is the ſubſtance of the Covenant, and not the going with the next wind, which is uncertain in every hour. And vouch't that a condition precedent is traverſable. 3 H. 9. 33. 48 E. 3. 34. 9 E. 4. 3. b.

2. The Declaration was upon a Covenant by Indenture between the Plaintiff and the Defendant and one A. And upon oyer of the Deed. It was between the Plaintiff and the Defendant and A. and B. and for that cauſe naught. 15 E. 3. Three Covenant joyntly and ſeverally, and the Plaintiff declares quod defendens non ſolvit, without ſaying, nor any of the others, and yet that was well enough, becauſe the action was not brought againſt them all; For then otherwiſe it had been. And if any of the others had paid it to the Defendant might well and properly plead that. So it is in debt upon an Obligation where two are bound jointly and ſeverally.

Walden and Gelner *againſt* Veaſely,

THe Plaintiffs being Sheriffs of Coventry, &c. bring debt for 7 l. and 8 pence for an exception of one hundred pound So that their Fees for their fees demanded was 12 d. for every pound untill 100l. and 6 d. for every pound over and above. Read the words of the Statute and for the conſtruction of it, note the proviſo in the Statute 28 Eliz. which does not extend to a City corporate. And note that Statute is introductive of a new Law. For the encouraging of Officers to venter to do executions. And in that Caſe it was reſolved.

Intr. H. 1 Car. B. R. rot. 710.

1. That the Sheriff may have an action of debt for his fee, although he Statute does not give any remedy. And it was ſo adjudged. 14 Jac.

B.

B. R. rot. 531. Probee and Lumbee Sheriffs of London. And so debt by a Parson upon 2 E. 6. 6. for not setting out of tithes. And that in our Case it was also rul'd; That the Sheriff may refuse to make execution, untill his Fee be paid him. But then see if a new Sheriff be made, and before that the old one had made execution. What remedy now hath the party. And it seem'd to me, that he may have an accompt, or an action upon the Case, in nature of an assumpsit.

2. It was resolv'd that the Proviso extends to a City corporate, when Judgement is there given within their Franchise, and execution upon that: And not when Judgement and execution issues out of superiour Courts. For in the first Case the Officer is not at that Grand care and peril, But as to the Sheriff of a County, his travail and labour is all one be it in the body of the County or in a Franchise. But if that town be a County of it self, there the Sheriffs shall have their Fees according to 28 Eliz. And now Judgement was given for the Plaintiff, But now there was much doubt upon the words of the Statute, and the Court devided in that point; If the Sheriff shall not have 12 d. for every pound to an hundred, and after 6 d. or if he shall have but 6 d. for every pound when the execution is more than an hundred. Coopers Case. That a Sheriff cannot take an Obligation with a penalty for his Fee within the Statute.

Bagshar *against* Salter.

IN an Assumpsit, the Plaintiff declares, That whereas John Green was indebted to the Defendant in 30 l. And that the Defendant had sued and recovered against Green, and in Tr. 18. Iac. had a cap. ut lagat against Green directed to the Sheriff. And upon communication between the Plaintiff and the Defendant; The Defendant promised that if the Plaintiff would go to the Sheriff, and procure a speciall warrant and arrest Iohn Green, that he would give him 40 s. And averr'd that he had done so, and had often requested the same of the Defendant. And issue joind upon non assumpsit, it is found for the Plaintiff. And it was mov'd in arrest of judgement, and so rul'd by the Court, that the Assumpsit is void by 43 H. 6. And Judgement quod querens nil capiat. But one Audleys case was vouch'd and agreed that an assumpsit made to an Estranger, to go and help the Sheriff to make execution is good, and an assumpsit lyes.

Crouch *against* Hanney.

C. had Judgement in the C. B. in an Ejectione firm. and H. brought a writ of errour in the Kings bench. And the Judgement was there also affirmed. And afterwards he brings errour in the Parliament: And the chief Justice in the Kings bench brought the record it self in Parliament, and there left a transcript of it, and reports the record it self. And after, the Parliament is dissolv'd. And C. now prayes execution, and had it: although that the errour abated without the act of the party. And Noy said, It is doubted if errour in Parliament shall be a supersedeas; for upon that if the party be in execution, he shall not be bayld as it should be in another Court. vr. 1 H. 7. 19 b. 15 H. 6. 18. By dissolution of Parliament the errour is abated, 22 E. 3. 3. 1 H. 7. 19. And so was the case of Godsave and Heydon. Errour in Parliament abated by dissolution. And by Roderidge Errour was brought in Parliament, and the party prays a scire fac. returnable the next Parliament, and it was denyed for the delay. And in our case execution was awarded.

Argoll

Argoll *againſt* Cheyney.

THe point in that caſe was, Father leſſee for life, the remainder to the Sonne in tayl, and a præcipe is brought againſt the Father who vouches the Son; And a Common Recovery was had accordingly; and Indentures made reciting, that that Recovery was between the Father and the Recoverers, &c. to the uſes in that Indenture. And becauſe no proof was of the aſſent of the Sonne to that Declaration of the uſes, nor was party to the Indenture. The Court directed the Jury to finde the uſes according to the Eſtates that the parties had at the time of the Recovery: And ſo they agreed, that if two ſoyntenants ſuffer a Common Recovery, and one only declares the uſes: that does not bind the moiety of the other. Unleſs that the conſent of the other to that Declaration be proved. vc. 2 Rep. 57 a. Dyer 143 a.

Cally *againſt* Sir William Fiſh.

VPon evidence. The caſe was thus. F. had three ſeveral cloſes 1 Arable, 2d paſture, 3d meadow. B. pretends a Right to all, and enters, and makes a leaſe of all to try title. The ſervants of A. with carts about their Maſters buſineſs enter in one of the cloſes. And by the Court that is an Ejectment of all: Although there be not any proof of the Command by their Maſter. *Intr. T. 22 Jac. B. R. rot. 1307.*

Heene *againſt* Warden.

IUdgement for ideo conceſſum, for conſideratum was revers'd for that errour. And ſo alſo M. 3 Car. B. R. rot. 231. Cooper againſt Williams. Judgement revers'd becauſe of the word conceſſum. *Intr. H. 22. Jac. B. R. rot. 654*

Marſhall *againſt* Allen.

AN action upon the caſe was brought for words, He is a baſe broken raſcal, and hath broken twice, and I will make him break the third time. And iſſue is joyn'd upon not guilty: and it was found for the Plaintiff, and now mov'd in arreſt of Judgement: that it is not actionable, (viz.) He hath broken twice; yet at that time he might be a ſufficient Merchant as others. And I will make him break, &c: is but a threatning, &c. But by Juſtice Jones otherwiſe it had been, if he had ſaid, He will break the third time. And a day was given to ſhew cauſe why Judgement ſhould not be reverſed.

Dixye *againſt* Browne.

AN Executor of an Executor was ſued for a Legacy, and he pleads riens in le mains. And that plea in the Spiritual Court was refuſed: Upon which a Prohibition was awarded out of the Kings bench. Note in the caſe there was theſe points touch't upon; That in the Common bench a prohibition ſhall not be warded, until the ſuggeſtion be of record; And for that the prohibion is the ſute of the party, and ſhall not be diſcontinued by the demiſe of the King. But otherwiſe if it be out of the Kings bench. For there a prohibition may be awarded upon a bare ſurmiſe, without any ſuggeſtion of Record, and is not but in nature of a Commiſsion prohibitory: which ſhall be diſcontinued by demiſe of the King.

Carleton *against* Hutton.

C. claims the upper place in a ſeat in the Church, and H. diſturbs him in violent manner; and the Biſhop of the Dioceſſe ſends an Inhibition to C. until the matter be determined before him. And by the Court a prohibition was awarded; becauſe it does not belong to the Spiritual Court: And as well the Priority in the ſeat as the ſeat it ſelf may be claimed by preſcription: and an action upon the caſe lies for it at Common Law, ve. Litt. 121. 122.

Bellamy *against* Alden.

AN Adminiſtrator accounts before the Ordinary, and a Creditor of the inteſtate takes exception to it, and averr'd that the Adminiſtrator had not paid ſo much: and the Adminiſtrator proved payment by one witneſs, and for default of better proof, he was excommunicate. And a prohibition was awarded. Becauſe the Ordinary had not power in ſuch a caſe to hold plea, and to try the payment or not payment: or adminiſter an Interrogatory to a witneſs, but ought to accept the accompt as it is. For the Creditors may ſue for their debts at the Common Law; and then payment or not payment ſhall be well tryed, and there one witneſs will ſuffice: 13 E. 3. Exec. 91. An Executor ſhall not have an account againſt his Companion.

Dixon *against* Iames.

AN eſcape was brought againſt the Bayly of a Franchiſe; and the Plaintiff counts of a Recovery in the Common bench, by an attachment of privilege in the Common bench. And now errour was brought in the Kings bench.

1. Becauſe he had not ſhewed, that the Plaintiffe was an Officer. By the Court, That the Sheriff nor Bayly ſhall not take advantage for that errour.

2. He had counted that the Bayly had arreſted the party; and detein'd him ex cauſa prædicta, from ſuch a day until ſuch a day, in which he eſcaped. And he does not ſay, that the Bayly arreſted him virtute Warranti, which the Sheriff had made to the Bayly. And that alſo was diſallowed, Becauſe ex cauſa prædicta ſupplyes that. For he cannot be intended to be arreſted for other cauſe. And Judgement affirm'd.

Awdleys Caſe.

HE had the grant of Townclarkſhip in reverſion, and he in poſſeſſion dies, and one Joy was admitted to that office, and Awdley had a reſtitution: And it was ſaid that the Kings Bench hath Juriſdiction of all ſuch cauſes, and one Boſtons caſe was vouch'd. B. was elected to be Alderman upon purpoſe to ouſt him of an Office of Townclark, becauſe they are incompatible offices in one perſon: And in the Kings Bench he had reſtitution to the firſt office. And one Midletons caſe was vouch'd, and he was elected Conſtable, and ouſted by the Juſtices, and in the Kings Bench had reſtitution; And it is the direct way to try the title upon the return of the reſtitution. And agreed by the whole Court.

Randal

Germin *againſt* Randall.

THe Condition of an Obligation was to pay 10d. weekly for the keeping of a baſtard, according to an Order made by the Juſtices, &c. The Defendant pleads null. tales fec. ordinem, and the Plaintiff had Judgement, for that is an Eſtoppell to the Defendant. Otherwiſe it had been, if it had been, according to an Order to be made, &c. Becauſe that is Executory, vt. Dyer 196. *Intr. H 1. Iac. B. R. fol. 443.*

AN action of Debt was brought againſt A. as Executor to Samuel Baker upon an Obligation; The Defendant Defendit vim, &c. et dixit quod ſcript. præd. non eſt fact. ſuum. And iſſue upon that. And it is found for the Plaint. And it was mov'd in arreſt of Judgement, that the plea was not good: For ſuum cannot be referr'd to the Teſtator, of whom no mention is made in the barre. But by the Court, Judgement for the Plaintiff. And by Doderidge, If Husband and wife bring an action of Treſpaſſe of battery, de bonis ſuis aſportatis, that is good, pro reddendo ſingulis ſingula.

Newman *againſt* Cheyney.

AN action of trover is brought againſt baron and feme, for a converſion (during the coverture) by the wife. And it was ſaid by the Court, that it is good. For by Juſt. Jones, Although that feme covert cannot make a contract for goods, nor be charged for them; yet ſhe may convert them, &c.

Drope *againſt* Thairye.

IT was adjudg'd that the Maſter may have an action againſt the Common Officer, if his ſervant be be robb'd there, and he need not ſhew that the ſervant was in his journey. For he may be at the end of his Journey, as at London about his buſineſſe. Sir William Sandye's caſe was vouch'd to be Term. 7. Iac. rot. 15. 35. B. R. It was between Beedle and Morris. Where the Maſter had the Action. *Intr. T. 1. Car. B. R. rot. 115.*

Hardwin *againſt* Warner.

A Feoffment was made by Sir William Shelley to 4 men, with power of revocation, upon tender of a Ring, or a pair of Gloves of 12 d. price, to the Feoffees or any of them, or to the heir of any of them. Sir William was attainted of Treaſon. And by Act of Parliament 28 Eliz. with the ſame words which are in 33 H. 8. his lands, &c. are given to the Queen, with a clauſe that every one that claims any intereſt from Sir William bring their Deeds to be enrolled in the Exchequer, otherwiſe they ſhall be void. And that feoffment was enroll'd accordingly. And afterwards the Queen awards a Commiſſion to Sir Francis Forteſcue to tender the ring &c. according to the Proviſo in the deed of feoffment. Who returns that he had tendred the ring, &c. to Sir Anthonye Hungerford, heir apparent of one of the Feoffees. And then the Queen makes a Leaſe of that Land to Hardwin, who enters. And Warner brought an Ejectione firm. And in that caſe it was reſolved. *Intr. 19. Iac. B. R. rot. 1553. vel. 1353.*

1. That the return of the Commiſſion was good, as to the ring, although that no price of it was in the Commiſſion return'd. For the

price of twelve pence only extends to the gloves.

2. That that return was naught as to the tender to the heir apparent, which implyes that the Ancestor himself was alive, and then it is not according to the Proviso. In debt upon an obligation, &c. against one as heir apparent in C. B. P. 35 Eliz. fol. 242. Chawdley *against* Newdigate and a recovery there, Afterwards for that very errour, 'twas reversed in the Kings bench. So it is naught in our case, also the certificate cannot be supplyed by a subsequent Record. But otherwise if it had been found by office that Sir Anthony Hungerford had been heir to Cro. to one of the feoffees: and after that certificate had been return'd as now it is: There it should have been good enough by all the Justices, and by the Counsel. But by Jones that is upon also. For the return was secund. form. conditionis, ve. 2 H. 4.

Luther *against* Holland.

An action was brought upon 5 Eliz for perjury before one of the Masters of Chancery, who had power to take an oath. Adjudg'd quod nihil cap. per brev. And the reason was, because he does not shew that the Oath was in Court. By Whitlock, They were call'd Masters of Chancery, because they were Priests and Clergy men in ancient time; And that was the reason that the Lord Chancellor had the disposal of the petty Offices of the King, for the preferment of those Clarks. What was also the reason that they could not marry, until they were inabled by the Stat. &c.

Challoner *against* Hobbs.

The Plaintiff in a replevin had Judgement, and a writ of enquiry of damages in the Common bench. The Defendant brought errour, then the writ of enquiry is return'd in the Common Bench: and Judgement there given of the damages; And the Plaintiff mov'd in the Common bench, that he might proceed to execution for the damages; and awarded that he might proceed. Mr. Browne said, that this is the course upon errour upon an interlocutory Judgement, to move the superiour Court, where errour is brought, for a rule to proceed in the inferiour Court, notwithstanding the errour brought. ve, Dy. 32. 8 rep. 142. 42 Eliz. 33. 11 H. 4. 49. 8 H. 7; 10.

Daniell *against* Upton.

H 22. *Jac.* B. R. *rot.* 720.

F. devises land to his wife to dispose at her will and pleasure, and to give it to which of his sons he pleaseth, and dies. The wife takes another husband; And by Indenture, reciting the devise, and her power by that, &c. during the coverture, enfeoffs William son of F. and yet the Husband and wife continue possession; And the wife only levies a Fine to William, sur conusans de droit, without proclamations, &c. And by the Court adjudg'd, that the wife had not but a power; and that she notwithstanding the coverture might execute the power: for the son is in by the Devisor. It was adjudg'd in the time of Poph. The father devises land to his two sons, equally to be divided betwixt them. And rul'd that the youngest son shall have it for life, although that the eldest being his heir had fee in the other moyety, by discent of the fee: because of the intent of the Devisor of the Estate. 10 H. 7. 20. A. devises to B. in tayl, the reversion to C. in fee, upon condition that B. shall grant a rent-charge to D. in fee. And adjudg'd that that is a good rent charge, and shall bind him in the remainder after the tayl determined.

Wat-

Watlington *againſt* Perry.

W. ſues P. in the Spiritual Court for tithes of a Dove-houſe. P. upon ſuggeſtion had a prohibition, that he did not prove his ſuggeſtion within the 6 months. W. takes iſſue upon the ſuggeſtion, and it is found againſt him; and yet he prays coſts by the Statute 2 E. 6. for ſayler of proof within the 6 monethes. But by the Court adjudg'd, that he ſhall not have it; For he hath forceaſt his time, to take advantage of that, and he can never have a conſultation: Ergo, he ſhall not have double coſts. Read the words of the Statute.

Stewards Caſe.

PArſon prefers his bill for tithes of corn, and alleges that time out of mind, &c. in that parith they have us'd to allot the tenth ſhock; whereupon the pariſhioner ſuggeſts, That the pariſhioners and all thoſe who had Eſtates, &c. have us'd only to ſet out the tenth ſheaf for tithes, and had a prohibition. The Parſon prays a conſultation, but it was deny'd. And reſolv'd by the Court.

1. That the Parſon might ſue for Modus Decimandi in the Spiritual Court. 2 R. 3. 3 a. But if the pariſhioner denies that, they ought to forceaſe, and a prohibition lies, and that ſhall be tryed at the Common Law.

Goodwin *againſt* Willoughby.

IN an aſſumpſit. The Plaintiff declares, That the husband of the Defendant upon an in ſimul computav. was indebted to him in 100 l. and that the husband had promis'd to pay it. But he dies, and that the Defendant having notice of that, and that the Plaintiff intended to ſue her upon that promiſe, Came of her own accord to the Plaintiff, and requeſted him, to forbear to ſue until Michaelmas: and in conſideration of that, promis'd to pay, &c. And the iſſue upon non aſſumpſit is found for the Plaintiff, and now mov'd in arreſt of Judgement.

1. Becauſe it is not ſhewn what the accompt was, &c. But by the Court, that is well enough, becauſe it is the ſole inducement, and need not be particularly ſhewn; Becauſe it would be infinite.

2. The ſecond exception was, Becauſe it is not ſhewn, that ſhe was Executrix to her husband, and therefore not lyable. Juſtice Jones vouch Whitypooles caſe. An Infant contracts, and at full age promiſes to pay, &c. And an aſſumpſit was brought againſt him. And yet that being not for neceſſaries, was meerly a voyd contract. And Doderidge ſaid, That the wife of ſuch an Infant, who had contracted as abovelaid, being Executrix to the Infant makes promiſe for forbearance, an aſſumpſit lies. Crew, It is a grand preſumption, that it was a due debt, and that ſhe was Executrix to her husband. Iermin pray'd Judgement for the Plaintiff, Becauſe the Defendant firſt made the requeſt to forbear: as Dyer 127. And now a peremptory day was given to the Defendant, &c. to ſhew cauſe why Judgement, &c. ſhould not be given, &c.

Paſchal *againſt* Warren.

THe Adminiſtrator had Judgement upon an obligation &c. and the Adminiſtrator dies inteſtate. B. his Adminiſtrator ſues a ſcire fac. upon that Judgement. And upon two Nihils return'd, had Judgement

and execution made upon it. And now it was mov'd upon the very matter, That the Adminiſtrator upon an Adminiſtrator could not have execution, &c. But pray'd now, that he ſhould not have the monies levied, &c. But the Court ſaid he came too late after Judgement upon the ſcir. fac. to remedie it by motion: but he is put to his writ of errour. And ſo there was a day given to ſhew cauſe why the Plaintiff ſhould not have his money. M. 44. & 45. Eliz. rot. 168. Yate *againſt* Goffe was vouch't: That an Executor of an Adminiſtrator ſhall not have judgement or execution in ſuch a caſe, 4. Rep. 9.

Markham *againſt* Cobbe.

Intr. T. 1 Car. B.R. rot. 112.

AN action of treſpas was brought for breaking his houſe, and taking and carrying away of 3000 l. of money in baggs. The Defendant ſaid, that he and one A. were indicted for that before the Juſtices of Aſsize, &c. in the County, &c. by procurement of the Plaintiff for the ſame offence, as of Burglary, &c. and that A. was found guilty as principal, and he as accellary, and had his Clergy. And demanded judgement if an action ſhall be brought againſt him: For nemo debet bis puniri pro uno delict. 4 Rep. 39. 43. 2 Rep. 3. 14 & 9. And when he had been convicted of Felony, the Plaintiff had not any remedy for his goods, until the Statute 21 H. 8. It ſeem'd to Juſtice Jones, that the action would not lie, Becauſe it is found to be felony by the verdict, and enqueſt; and the party ſhall not be admitted now to make that treſpas. Tit. Coron. Stamf. 100. Doderidge and Whitlock on the contrary; Becauſe an Indictment is at the ſuit of the King. But otherwiſe if it had been by appeal 6. E. 4. 4. Felony made petty treaſon, yet is preſentable at Leet as Felony. 1 R. 3. 1. 11 H. 7. 22. But by the Court the plea in barr is naught; Becauſe it does not ſhew that the plaintiff had given evidence for the conviction; For otherwiſe he ſhall not have reſtitution: and an allegation of procurement is not ſufficient. Et ea de cauſa Judgement was given for the Plaintiff.

Vincent *againſt* Beverlye.

AN annuity was granted by the Father to the younger ſon, who delivers the deed to a Friend, who loſes it. And the younger ſon ſues the eldeſt at the Councel at Yorke. Doderidge ſaid there was not any remedie or ground of equity in this caſe. For the deed might be upon condition or other limitation; and the deed might be loſt by practice or covin to charge the heir abſolutely. That caſe was referr'd to Juſtice Hutton, H. 2. Car. And it was ſaid by Doderidge, and not denyed by any, That if the Leſſor enters, and ſuſpends his rent, he ſhall not have his remedy in Equity for it: for it is contrary to the Law.

Calf *againſt* Bingley.

C. Recovered in debt againſt A. and had a ſciri fac. againſt Bingley, his Baily, who pleads that after the judgement A. brought errour in the Exchequer-Chamber. And hanging that, A. had rendred his body in the Kings Bench, for only a tranſcript of the Record is remov'd in cuſtod. Mareſcalli; And there hanging the errour dies. Which matter he is put to averr per pais. And it was rul'd by the Court,

1. That that averrment is naught, for it ought to have been by Record. And Ierman ſaid that hanging that ſuſpention of the execution

ecution; The principall cannot render himſelf, For then he cannot be in execution.

2. That by the death of the principal the Bayly is diſcharged. So by Juſtice Iones if he had died before the return of the firſt ſcire fac. So in Hobbs and Todcaſtles Caſe. That death after a cap. againſt a principal, and before a ſcire fac. againſt the baile is a diſcharge; And ſo all the Clerks affirm'd.

Hodges *againſt* Moor.

THe Defendant being Burges of Parliament, brought a letter from the Speaker of the Parliament to the Kings Bench, to ſtay, &c. And it was diſallowed by the Court; For it ought to have been a writ of privilege, And it was ſaid that when Thorp was Speaker of Parliament: he had a generall ſuper-ſedeas for all actions againſt him, &c. And it was held ill. For he ought to have had a ſpecial ſuper-ſedeas for every action. And that the Parliament onely privileges the perſon of the Members of it, and not ſtals the proceedings of the Kings Court. And ſo in the Caſe of Curteſie againſt Welcot. That if A. had recovered againſt B. in two ſeveral actions, and had Judgment &c. That B. might not have one audita querel. But he ought to have two ſeveral writs.

Sharp *againſt* Rolt.

R. promiſed to Sharp that if he would deliver certain wares to the Daughter of the Defendant, that he would pay for them. By the Court that ſhall be intended payment to the Plaintiff. But yet the Declaration ought to have been certain. But in our Caſe it was well enough, ve. 40 E. 3. 30. 2 E. 4. 21. Plowd. 149. An aſſumpſit without ſhewing to whom is naught. And ſo it was adjudged upon a falſe Judgement. T. 3 Iac. C. B. rot. 507. Harding againſt Uaton. That if the Jury found, that the Defendant aſſum'd modo et forma, without ſaying to whom, yet it is good. and ſo it was adjudg'd.

Cowlin *againſt* Cook.

IN an action upon the Caſe the Plaintiff declares, that whereas the Defendant was obliged to him in 100 l. and that he intended to ſue him for it, that the Defendant in conſideration that the Plaintiff would deferr the payment of the money aforeſaid, and not ſue him upon that obligation, promiſed, that he would pay him, and aſſum'd upon that. Mr. Littleton. That it is not a good conſideration; For he may forbear and deferr, &c. for a day only, &c. as 19 Iac. Kebbs Caſe. A Leaſe at will is not a good conſideration, for the Leſſor may determine it preſently. But by the Court in our Caſe, it is a good conſideration. For the deferring ſhall be intended during all the life time of the Obligee: and that if he ſues him ſooner upon that Obligation, an action upon the caſe lies. And ſo it was ruled in one Barkehams Caſe. But if it had been quod deferrat pauculum temporis, that had not been a good conſideration without putting a certain time.

Weaver *againſt* Felton

VPon errour; By the Court, after in nullo eſt erratum pleaded, the Plaintiff and Defendant are eſſopped to alleadg a diminution, and no certiorari can be awarded at the ſuit of the partyes. But Biſhops caſe, and other Preſidents are, That the Court ex officio may award, a certiorari

orari ad informand. conscientiam : and that which is certified shall be annexed to to the Record, and is called a Rider-roll, ve. 22 E. 4. 46. a. 28. H 6. 10. Dyer 32 . b. 9. E. 4. 32. b. And note in Chapmans case the difference. If a diminution be alleg'd, in a thing collaterall as warranty of Atturney, or any mean process, that is not of the body of the Record, so diminution may be alleg'd, after in nullo est er. But otherwise, if it be of the substance, and part of the Record it self, As if returned in the detinue only, where the first action was in the debet and the detinet. ve. 1 H. 7. 21. which reconciles many differences.

Haman *against* Witchbowe.

The Plaintiff in an action upon the case declar'd, that he and F. are tenants in Common, &c. and have common in the land of the Defendant, and that the Defendant had made trenches in it, by which the cattel of the Plaintiff were in danger to perish, &c. And the issue upon not guilty is found for the Plaintiff; and now mov'd in arrest of Judgement, That the Declaration is naught, Because a tenant in Common cannot have an action in such a case. And that was allowed by the Court for good cause.

Surrey *against* Piggott.

H. 1. Car. B. R. rot. 124. [illegible]

The case was in effect thus: A. seis'd of Wh. acre, and also of an house, with the Curtilage and Hop-yard, and in the Curtilage there was a water pond for the cattel, and the water pond came and gourded through the Hop-yard into the pond. A. enfeoffs P. of the Hop-yard, and afterwards leases the house and Curtilage to S. P. stops the stream, and S. brought an action upon the case. And the question was, if by the unity of possession, the watercourse be gone, so that the Feoffee of the Land by which he Gourded might stop it. And adjudg'd, that it is not extinct.

1. Because it is a thing of necessity by the continual flowing of the stream, 12 H. 7. 4. Of a gutter. So it is also of a thing that hath an existence during the time of the unity. As a Warren, ve. 35 H. 55. Warrens 16. Otherwise of a rent or a way which a man cannot have in his own land. 14 H. 7. 7. And Barkesdale cited the case of M. 6. Jac. B. R. between Challoner and Moore. That an Ejectione firm. does not lye of a watercourse, because it is a thing fluent and current, and so incertain. Note 11 H. 7. 25. of a gutter. Mr. Beare argued to the contrary, and voucht 21 E. 3. 2. 31. H. 6. 3. a crosse way extinct by unity. And by Doderidge, That a cross way of necessity is not extinguisht by unity; otherwise of a crosse way of ease. And so was the opinion of the Lord Popham in the Kings bench in the Lady Brownes case, who had a water-pipe through Whiteacre running to her house, and purchases Whiteacre, and then cuts and stops the pipes. There such a watercourse is good; Because of the intent of the owner declar'd, and the thing hath not now a continuance in the possession of the party himself. And Doderidge also agreed, that the Fence is extinguisht by unity; Because it is not a thing of necessity. And so the other Justices agreed. And by Crew, ch. Justice, That it was adjudg'd accordingly in 3 Jac. B. R. between Drew and Prake. And Doder. also put a case which was not denyed. A. had a watermill, and a watercourse to it, over his own land, and enfeoffs an other of that land, yet the watercourse shall remain for the necessity, And the Feoffee cannot stop it.

Lewes

Lewes *againſt* Whitton.

WHitton ſued Luce in the Spiritual Court for a defamation, and had ſentence, L. appeals, and hanging the appeal comes a pardon, which relates to the offence, and pardons it, Then L. defers his appeal; and for that W. had coſts tax'd him: And now L. pray'd a prohibition, becauſe he deferr'd his appeal becauſe of the pardon, which had taken away the offence. And by the Court in that caſe, after the pardon the Inferiour Court cannot tax coſts; but it was urged that the Superiour Courts might tax coſts upon the detention of the appeal: which is an offence after the pardon. But it was anſwered on the other ſide, That it was in vain to proſecute the appeal, when the offence it ſelf is pardon'd. The words were, Thou art a Pander, to Sir Henry Vaughan; And there was much debate if they were actionable at Common Law; yet it was agreed, That a Sute may be brought for them in the Spiritual Court. As for calling one Whore, Bawd, or Drunkard. But otherwiſe by Jones, If he had ſaid That he was drunk for then a prohibition lyes. And it was rul'd in 6 Jac. B. R. in the caſe of Cradock *againſt* Thomas; A prohibition was granted in a ſute for calling one Whoreſon. And in Weeks caſe, a prohibition in a ſute for calling one Knave.

Dr. Lambes Caſe.

HE was indicted for Sorcery and Witchraft (viz.) *quod exercuit quaſdam malas et execrabiles, et Diabolicas artes, anglice* Witchcraft Serjeant Atroe took exception to it, becauſe there is no word there that ſignifies Witchcraft in the Indictment, and therefore naught. As an Indictment, that A. had murdered quendam hominem ignotum Anglice I. S. That is not good. Now Incantation is an apt and proper word for witchcraft, as 4 Rep. Tormentum, anglice a Gun is good enough; Becauſe there is no other proper word for it. And for that the Indictment was quaſh'd.

Delavel *againſt* Clare.

IN an action upon the caſe the Plaintiff counts that the Defendant put cloth to the Plaintiff being a Taylor to make him a ſuit of cloths, and promiſed to pay him as much as he deſerv'd for the making of it, and for the neceſſaries thereof, &c. The Defendant pleads that he was an Infant at the time of the promiſe: Yet Judgement was for the Plaintiff; and this caſe was vouch'd M. 17. Jac. B. R. rot. 1574. Blackſtons caſe. A Brewer brought an action upon the caſe againſt an Infant for Beer; which he had ſold to the Infant, and the action was maintainable. For there need not in our caſe any averrement, of neceſſary apparel, and convenient for the Infant, for the promiſe is for making of it, and for petty neceſſaries alſo, as for linings and thred, &c. But an Obligation with a penalty, by an Infant, is void: Although it be for neceſſaries. And a caſe M. 3. Jac. in B. R. was vouch'd, That a Gardian in ſoccage may grant a Copphold that eſcheats to an Infant.

Giggham *againſt* Purchaſe.

AN Obligation to pay 100 l. 31 day Septemb. in debt brought upon that, and the iſſue upon payment, and found for the Plaintiff: And it was mov'd in arreſt of Judgement that that iſſue is upon an impoſſibility. For Septemb hath but 30 days. Then by the Court it is payable

able presently, and non payment ad diem is well found for the Plaintiff, and the issue is ayded by 18 Eliz. of Ieofayles, And Judgement for the Plaintiff.

Parke *against* Stewsam.

AN action upon the case is brought, for stopping a way which the Plaintiff had from such a place over Black acre, where the nusance is, unto such a field (by name) And it was rul'd to be good, without shewing what interest he had in that field. For it shall be intended to be a common field. But otherwise it had been, usque ad talem clausum. There he ought to shew what interest he hath in the close. Note 8 H. 5. 4 b.

Palmer *against* Litherland.

IN that case it was agréed by Doderidge and Iames, That an Executor durante minore ætate, if he waste the goods after the age of the Infant, shall be charg'd upon the special matter, and not as Executor in his own wrong; because he had a lawfull authority to that time. 6 Rep. 18 b.

Merritons Case.

A. and B. leases to M. for years, and Covenant that he may alien without disturbance, interruption or incumbrance by them, and an obligation was made for performance, &c. A. makes another lease to C. who enters, and M. brought debt &c. And by the Court it is well. For the Covenant is broken, and Them shall not be taken joyntly only, but severally also. ve. 2 Rep. 3. 12.

Rochester *against* Keckhouse.

ERrour upon Judgement in the Common Bench in an Ejectione firm. of one Messuage or tenement, And it was revers'd because of the incertainty. Note Dy. 264. Mich. 4 Iac. C. B. Waste, in Messuagia sive tenemento, And yet well by the certain assignment. Affirm'd by the whole Court that a writ in the disjunctive is void.

Petty *against* Hobson.

VPon Errour, A nisi prius awarded to be coram Fr. Harvey Armig uno Iust. dom. regis de Banco, and it was return'd to be coram Fr. Harvey milit. &c. And yet good. For he may be knighted after the Commission, and before the return; And so it was adjudg'd. ve. 35 H. 6.

Crabb *against* Tooker.

Intr. H. 1. *Car. B. R. vot.* 315.

VPon a Marriage betwéen the Son of T. and the Daughter of C. It was covenanted, that after the marriage, &c. T. should find to his Son and his wife, and their issues, competent entertainment of meat and drink, and during the life of T. and to live with him in his house. And that if the said T. the son, and his wife should dislike to live together, that then the son and wife should have such lands and such goods of T. the father, and to live where they please. The Son having issue dies, the wife takes a second Husband: The wife and T. dislike and disagrée, &c.

And

And now C. brought Covenant upon the Indenture for the lands and goods. Whitlock ſaid, that that is a diſagreement within the covenant, becauſe it came in lieu of maintenance. Doderidge and Jones on the contrary. For the diſagreement between the Father and Son, in the life of the Son had not been ſufficient. But by the Court, That T. ought to find meat and drink, &c. to the wife and her iſſue by the firſt Husband, during the life of T. And Judgement was given according to the opinion of Doderidge and Jones.

By Mr. Littleton, who mov'd divers exceptions to an Inquiſition taken by the Coroner of Montgomery; and it was adjudg'd, that ſuch an Inquiſition ought to be upon view of the body. But when a man drowns himſelf, and the body cannot be found; That cannot be found before the Coroner, but the Juſtices of the Peace ought to inquire of that. As it was declar'd for Law, T. 13. Iac. B. R.

Maſon and Bavy *againſt* Dixon.

The Sheriff arreſts A. upon a latitat at the ſuit of B. A. eſcapes, B. makes executors and dies; And they bring an eſcape. And it was doubted if it lies. Becauſe a latitat is only as a mean proceſſe, and is not an execution, in which caſe the party hath not other remedy: and the Court was divided in opinion. Hide and Jones, that it does lye, Doderidge and Whitlock that it does not. 5 Rep. 27. Trover by an Executor for converſion in vita teſtatoris. And in M. 33. 34. Eliz. C. B. rot. 506. The Biſhop of Lichfield's caſe. A quare impedit by an executor for diſturbance in vita teſtatoris. And now this difference was put and agreed, That the Executor ſhall have the action, where the thing it ſelf is to be recovered: but not where damages only are to be recover'd. *Intr. T. 3. Car. B. R. rot. 1360*

Sir Richard Lucyes Caſe.

He was indicted for not repairing of an high way. And by Serjeant Thinne an exception was taken, becauſe he is miles et barronettus, and is not named Barronet in the indictment, and Mr. Holborn ſaid it was reſolved in the Common Bench, That in an action brought againſt a Barronet, he ought to be nam'd Barronet, and it is a clauſe that they ſhall be impleaded, &c. by ſuch name in their patent. And the indictment above was quaſh'd, Becauſe it is not ſhewd of what place Sir Richard Lucy was an Inhabitant. *In. M. 2. Car. B. R. rot. 150.*

Wood *againſt* Witherick.

The Plaintiff declares upon an aſſumpſit, upon an inſimul computav. &c. The Defendant pleads infancy, the Plaintiff replies that it was for neceſſaries: and agreed by the Court, that an action upon the Caſe, &c. ſhall lye well upon a promiſe by an Infant for neceſſaries. But in our Caſe the action is grounded upon an accompt, which an infant cannot make. And in our Caſe, the value and neceſſity of the things is not requiſite to be given in evidence, but only the accompt: And therefore in our Caſe the action will not lye. But by Maſter Maſon, and ſo it was adjudged, M. 19. Iac. B. R. Sterril againſt Holliday; And the reaſon was becauſe an Infant may be an accomptant.

Tharsby *against* Warn and Sands.

Intr. T. 2. Car. B.R. rot. 1033. T. Brought an action of treſpaſs 1. 2. Car against W. and S. for taking of his goods, &c. they juſtifie the taking of them by authority of a Commiſsion of Sewers, granted by the late King Iames, for a tax aſſeſt, by authority of that according to a Stat. 32 H.8. cap.5. And the barr adjudg'd ill. Becauſe they do not averr, that the aſſeſsment was in the time of King Iames. For the Commiſsion is expired by the death of the King. And note well the clauſe in the Stat.32.H.8. ſhall be intended in the time of the ſame King that granted the Commiſsion. And rule was given for judgement.

A. For conſideration promiſed to make to M. an aſſurance of Wh. acre, but afterwards he refuſes to make it; and M. ſues him to make it, in the Court of requeſt. And there was now mov'd for a prohibition, becauſe M. might have an action for that at the Common-law. But not allow'd. For by the Court, he cannot ſue at Common-Law to aſſure Wh.acre, the thing it ſelf. But to recover of the damages only.

2. A prohibition was pray'd; Becauſe it appear'd in the bill, that the plaintiff is a Recuſant convicted, and ſo a perſon excommunicate; But by the Court, the Defendant hath anſwered him, there admitting him a perſon, able; and tis now too late to have that plea. And a Prohibition was denied.

NOte, An Infant brought an appeal of murther by his Guardian: and at the day in Court, it was prayd, that the Guardian ſhall not be demanded; Becauſe he is ſick, and prays 2 or 3 days longer. By the Court, That cannot be in an appeal, and we will not make new Laws. So the Guardian was demanded, and he came not, by which he loſt his appeal.

Sherwoods Caſe.

AN action of treſpaſs was brought, for taking of a load of Fetches. The Defendant ſaid, that they did grow in Wh. and Bl. acre, and for Bl. acre conveys his title from A. and for Wh. acre from Potts, and Dame Urſula his wife, and that he by their Commandement, &c. and it was rul'd by the Court.

1. That it is not a good exception to the barre, that the wife of Potts was called Lady, but otherwiſe in a writt.

2. That the commandement ſhall be taken reddendo ſingula ſingulis.

3. It was rul'd to be a good exception, becauſe the Defendant had not averd quantum creſcebat in Wh. acre, and quant. in Bl. acre, and for that the plea was ill But in our caſe the Defendant had demurr'd upon the replication of the Plaintiff, which was ill. And ſo it was of purpoſe as it ſeem'd in policy.

Kitely *against* Haynes.

Intr. M. 2. Car. B.R. rot. 4837. AN action upon the caſe upon 9 ſeveral aſſumpſits of ſeveral ſumms of money, which in the whole came to 72 l. when in truth the particulars did not amount to ſo much. And iſſue is joyn'd and found for the Plaintiff, upon a non aſſumpſit, and damages aſſeſt to 42 l. which is leſſe than was due. And the firſt matter was mov'd in arreſt of Judgement, and rul'd that it ſhall be arreſted, 5 E. 4. 14. See ſuch a caſe reſolved.

Note

NOte A. recover'd and had Judgement againſt B. and had a cap. and pays the Sheriff his fee, and delivers him the cap and ſhews him B. and the Sheriff turns himſelf about, and ſaid I cannot ſee him; and afterwards returns a Non eſt inventus. And upon affidavit made of it, how it was done; The Sheriff was remov'd, and a new one made: an attachment was granted againſt him, becauſe the contempt was made during his Office.

Bellamy *againſt* Baithrop.

BY the Court, That where the Defendant in Trover, &c. juſtifies by Leaſe of the tithes, &c. by the Impropriator for a year. That yet it is meerly void without deed. Otherwiſe if it be by leaſe of the tithes of a year by the Parſon himſelf. And that ſo it was rul'd 20 Iac. B.R. Bennet *againſt* Spell. *Intr. M. 2. Car. B.R. rot. 179.*

Good *againſt* Lawrence.

ERrour was aſſign'd, Becauſe the Judgement in the inferiour Court was ſo entred. Ideo ad petitionem querent. conſiderat. adjudicat. & aſſeſſ. By Court, quod quer. recup. damna, &c. tax'd by the Jury, nec non damna de incremento, &c. and rul'd for errour. *Intr. M. 2. Car. B.R. rot. 119.*

1. For the addition of the adjudicat. & aſſeſſ.

2. Becauſe there is not any requeſt of the Plaintiff, for the increaſing of the damages, and that ad petitionem querent. before was miſplaced, and it is not ſufficient, for it is in an undue place. So Judgement was revers'd.

Dr. Cademan *againſt* Grendan.

C. brought an action of treſpas againſt G. who pleads the Statute of 3 Iac. cap. 5. of Recuſancy; That if any popiſh Recuſant be convicted, that he ſhall be taken in Law as an excommunicate perſon; And averr'd that the Plaintiff was convicted at ſuch a place, &c. unde petit Judic. of the bill. The Plaintiff demurrs, Quia placitum illud minus ſuffic. certum & iſſuabile in lege exiſtit, &c. And the Court for the Plaintiff, that the plea is naught. *Intr. T. 2. Car. B.R. rot. 549.*

1. Becauſe there is not ſhewn before what Juſtices he was convicted: ſo that if it had been denied, the Court might know to whom to write for a certificate of it.

2. He hath not averr'd his plea with a hoc paratus eſt verificare by Record.

3. The concluſion, as Judgement of the bill, is alſo naught. But of the third part there was ſome doubt. But at length by the Court, a reſpondeas ouſter was awarded. And ſo it was alſo in Tr. 2 Car. B. R. rot. 894. Ratcliffe againſt Bewcock, upon that Statute. The Defendant concludes, Judgement ſi actio where it ſhould have been, If he ſhall be anſwered, ve. 24 E. 3. 26. 34 H. 6. 8. 11. rep. 52. Clench the Clark ſhewed a Record, Pas. 2 Car. B. R. rot. 331. where the Defendant after imparlance pleads out-lary in the Plaintiff, and demands Judgement of the bill. And Judgement was, That he ſhall anſwer further. And the Court agreed to that.

NOte a prohibition was awarded, upon the 23 H. 8. Becauſe the party was ſued out of the Dioceſſe. And now a conſultation was

pray'd because the inferiour Court had remitted that cause to the Arches, and their Jurisdiction also. Yet a consultation was denyed. For it ought to be pleaded upon the prohibition.

Ganton *against* Ganton.

Intr. M 2. Car. B. R. rot. 366. ERrour upon a Judgement in the Isle of Elye.

1. In the Stile of the Court, because it is not shewn by what authority they held pleas there.

2. Because it is not shewn that the cause of action arises within their Jurisdisdiction. And although that in that Court they do not use other entry of the stile, or of the mattter, yet when they are to certifie it, they ought to shew those things; for the superiour Courts take not notice of any inferiour Courts, or of their authority. Unlesse it be in case of the County Palatine, or a Court by Act of Parliament, as in Wales. And Judgement was revers'd.

Halsells Case.

HE was indicted for stopping the Kings High way in Kensington. But does not allege any Buttalls of the King, (viz.) Leading from such a village to such a village, &c. And by Justice Jones it needs not, being the nusance is in the Kings Highway, which is intended to go through all the Realm. But otherwise it should have been of another Common way. To which Doder, and Whitlock agreed.

NOte, if a lat. be against two, one is taken, and he puts in bayl in Mich. Term, and afterwards the other is taken, and he puts in bayl in Hill. Term: And it was pray'd that the bayl of Mich. Term might be taken off the file of that term, and put upon the file of Hill. term; For otherwise the Plaintiff cannot proceed against them joyntly, upon bayl put in several terms. And Clench Deputy Secondary said, that that is the course of the Court. And it was rul'd that it should be done according to the use in such a case.

Laycock and his wife *against* the Undersheriff of Wilts.

THey Count that they have sued a lat. against one Willmott, and that the Husband delivered it to the Under Sheriff when W. was in presence, and he was the Under Sheriff appointed, and did execute that Office, and yet notwithstanding he returns non est inventus, in deceptionem. And upon that they bring this special action upon their case against the Defendant. Serjeant Ashley argued that it lies. For an escape shall be always brought against the Sheriff himself, yet upon a special falsity an action may be well brought against the Under Sheriff. Dyer 238, 239. 278. But the Court seem'd to the contrary. For the Under Sheriff is not an Officer to the Court, but the Sheriff himself shall be amerc'd for all defaults, neglects, and falsities of the Under Sheriff; but shall not be imprisoned for him. And note 5 E. 3. 26. No challenge for consanguinity to the Under Sheriff. And also that misdemeanour was in execution of his office, and is laid as a ground of the action.

Clapham

Clapham *verſus* Middleton.

An action of Treſpaſſe was brought quare teſtas diverſas (anglice) (Earthen Pots) ipſius querentis cepit. And mov'd that it is naught for the uncertainty. And ſo was the opinion of the Court. As 5 Rep. 34. Treſpaſs was brought quare pices ſuos cepit, without ſhewing the number, or of what nature they were, And therefore naught. *Intr. M. 2 Car. B.R. fol. 613*

Palmer *againſt* Warner.

A ſuit was in the Spiritual Court, and ſentence paſs'd for one with coſts, And 9 months after the coſts are aſſeſt, and tax'd. And then comes a pardon of all Iac. which relates before the taxing of coſts. But afterwards the ſentence and that pardon was pleaded, and allowed in diſcharge of the coſts. Then W. who had recovered ſues an appeal, and P. brought a prohibition, and well, and no conſultation ſhall be awarded, becauſe by the Court that pardon relating before the taxation of coſts had diſcharged them. As 5 Rep. 31. Hall's Caſe.

Stock *againſt* Sicks.

A Lay patron having the next avoidance &c. preſents St. being the ſon of the laſt incumbent; The Ordinary for that refuſes. Becauſe by the Canon filius pati. non potuit ſuccedere in Eccleſia. Then the patron preſents Sicks. After which St. procures a diſpenſation of the Canon, yet the Ordinary inſtitutes and inducts Sicks, then St. libels againſt Si. and the Ordinary in the Delegats. And they now pray a prohibition. And allowed by the Court. And by Jones, that in ſuch a caſe it hath been 3 times granted. 1. In the time of Gawdy. 2. In Cooks time. 3. That time where both perſons claim of one and the ſame patron. And by the Court, that Canon does not bind us in England. And by Doderidge, A Lay Patron may vary from his preſentation before induction, but a Spiritual Patron cannot, becauſe he may well underſtand the ſufficiency of his preſentee at firſt. ve. 38 E. 3. 36. Dyer. 221. Kellw. 154. N. B. 14 E. 4. 8.

Dr. Suttons Caſe.

P. 3. Car. B. R.

He was deprived of the Office of Official of Glouceſter by the Commiſſioners 3 Iac. appointed to examine the defects of Chancellors, and that he was not read in the Canon or Civil Law. He ſaid, that time out of mind, &c. The Biſhops have uſed in their Dioceſſes, to inſtitute the Chancellorſhip, and that A. the Biſhop &c. had made him Chancellor by Deed; And that was confirm'd by the Dean and Chapter, by which he had a Freehold eſtate in that Office, &c. And Mr. Glanvill moved for to have a prohibition, but it was denyed by the Court; for it is unlawful for the Commiſſioners to depoſe for inſufficiency, that being within their Commiſſion; But upon a ſuit in the Spiritual Court for the profits of that Office, ſuppoſing the grant of that by the Predeceſſor does not bind the Succeſſor, As it was in Dr. Barker's Caſe. There a prohibition ſhall be awarded, becauſe the profits are temporall. But we in the firſt caſe cannot try the ſufficiency. ve. 8 E. 3. 70. 9 E. 3. 11. So it is if the Ordinary

dinary deprive the Pr. of a lay Hospital, for there he is not a Visitor, nor is it visitable by him. But otherwise of a Spiritual Hospital.

Alderman Harris's Case of Oxford.

He was depos'd of his Alderman-ship for scandalous words of Pr. Davors the then Maior of Oxford, in conference with B. (viz.) our Maior is a base fellow. And B. admonishes him of that which he spoke. Then H. said again, the Maior is a base, fellow and thou art a base fellow, that appears upon the return of the writ of restitution; But before that an attachment had issued against the Maior of Oxford for not returning that, and affidavit made of it, and a fine of 5 l. impos'd upon him. And in that case it was agreed by the Court.

1. That the pleading that he was depos'd per concilium Civitatis, and not civium according to their Customs and Charters, Was good enough. ve. 11. Rep. 94.

2 That the writ of restitution was well enough, although that in it there is not exprest any particular prejudice that the Alderman had suffered by that deposal; No more than in case of an infranchisement. 11 Rep. 93. Dyer 333.

3. That the attachment was well granted, without alias or plures. Because it issued out of that Court. But by Jones otherwise it had been, If it had been a restitution awarded out of the Chancery. But for the matter in Law, it was adjourned; For a grand debate was if those words were a sufficient cause of deposer. Noy aggravated the offence, and vouch't 33. E. 1. An accompt was brought in exchequer against the Lord Bruce, and he being condemn'd in the action, said to Heigham, Ch. Barron. Rogere, Rogere habes de me quod dudum petisti; Upon which the Baron, replyed, quid habeo. And the Lord Bruse answered, habes damnum et dedecus meum, and for that offence he was fin'd and committed to the Tower. He pray'd forgiveness of his offence, in all the Kings Courts, being bare and discend. And in the black Book, in the Exchequer, There is ordain'd a particular Law of the Exchequer, for the severe punishment of such offences, and contumelies against the Judges and Officers. ve. 23. E. 3. The Defendant in a writ of exhibishment of ward, beat the Plaintiffs atturney. Upon which he brought a special action upon the Case, and recovered three hundred pound. Because it is derogation of justice and goverment. And 32 H. 6. One was punisht for menacing an atturney.

4. By the Court, that as in our principall Case, If the Maior makes a false return, the party may indict him for perjury, upon the generall oath when he was admitted to the Office of Maior. And by Justice Doderidge And that by rule of order of that Court, the Maior may be compeld to make a return, upon an other particular oath; And that so it was done in the Case of the Maior of Coventr.

Ashfield *against* Ashfield.

Upon a demurrer the case was. Infant Copyholder in Fee Leases for years without licence, rendring a rent; And at full age he accepts the Rent, and after ousts his Lessee, who brought an Ejectione firm. And agreed by the Court.

Intr. T. 2 Car. B. R. rot. 913.

1. That a Lease for years by a Copyholder, although that it be a forfeiture, yet it is no disseisin to the Lord.

2. That the Lease is not void but voidable, and may be affirm'd by acceptance And Judgement for the Lessee for years. And agreed that such a forfeiture

ture, does not bind an Infant. 8 Rep. 44.

Harvey *againſt* Sir George Reynolds.

H. Brought Debt upon an Eſcape, and counts that he had recovered, &c. in Lond. againſt A. and had him in execution in Lond. and that from thence he was by hab. corp. remov'd and alſo committed to the Marſhalſes, where the Defendant was Keeper. And that he, &c. had ſuffered him to go at large voluntarily, &c. The Defendant confeſſes, &c. and ſaid, that he had broken priſon, and ſo eſcap'd contrary to his will; and that upon freſh ſuit he had retaken A. (viz.) 18 day of May, before the bill exhibited alſo. But in truth that 18 day of May was after the bill exhibited, and an imparlance had, yet it was before any plea pleaded. And by the Court that the reprizal is good cauſe. 13 E. 4. 9. For it ſhall be miſchievous to the party to attende for a reprizal, which if in truth had been before, &c. it had been a good excuſe and plea. As reparation of waſte, before the Writ brought is a good plea in waſte. Alſo there needs not any traverſe to a voluntary eſcape, where he confeſſes in voluntary eſcape; for that is a good [illegible] of action. And by the Court the Plaintiff had Judgement. *Intr. T. 2. Car. B. R. fol. 1173.*

Dicker *againſt* Molland.

IN a ſecond deliverance D. avows by feoffment made to A. and B. to the uſe of his father for life, the remainder to him in fee, and ſo conveys a title to him, &c. M. conveys a title to him, and takes a traverſe to the feoffment to A. and B. &c. and upon that are at iſſue; and the Jury found the feoffment to be made to A. B. and C. &c. to the uſe, &c. as D. pleads. And by the Court, that iſſue is well found for D. becauſe the feoffment to the uſe, &c. being found, that is the ſubſtance. And the number of the Feoffees is not traverſable. 21 H. 6.

NOte, one was indicted for not repairing of a way, which he ought to doe ratione tenuræ in Bl. acre in D. without ſaying tenuræ ſuæ. And that was naught by the opinion of the Court: For another may have the land. So 5 H. 7. 3.

Stone *againſt* Knight.

THe queſtion was if a ſubmiſſion to an Arbitrament by an Infant be void or voydable; for if it be void, then an Obligation made by him and his father of the one part, &c. is alſo void. ve. 8 E. 4. 1. and 22. 19 E. 4. 1. 10 rep. 31. Noy ſaid it was only voydable. 13 H. 4. 12. 10 H. 6. 14. And the opinion of the Court was, that the Infant might waive that arbitrament if it be to his prejudice and diſadvantage during his minority; But at his full age if he makes any note, which amounts to an agreement, that ſhall bind him; And the reaſon that an Infant cannot appear by Attorney is becauſe he cannot make a warrant. Alſo by the Court, That an arbitrament to pay, &c. to any of the parties of the one part is good. ve. 2 R. 3. 18. *Intr. H. 2. Car. B. R. fol. 234.*

Evans and Kiffin *againſt* Aſcuth.

IN Treſpaſſe, the grand caſe of a commend, was thus. Dr. Thornburye being Dean of York was choſen Biſhop of Limbrick in Ireland. But before conſecration or confirmation, he obteined a Patent, with large words non obſtante retinere valeat in commend. The ſaid Deanerye, &c. *Intr. H. 22. Jac B. R. fol. 1169.*

And afterwards he was choſen Biſhop of Briſtol, And then alſo before inſtallation he obtayned another Patent, with a more ample diſpenſation of reteining the ſaid Deanery in commend. Read the Caſe if need be upon the Record it ſelf.

1. It was agreed by all, That the Church or Deanery, &c. in England ſhall be void by ceſsion, if the Parſon or Dean, &c. be made a Biſhop in Ireland. For the Canon Law in that is one through all the world. Alſo Ireland is governed by the Laws of England, and is now as part of England by ſubordinacy.

NOte well 45 E. 3. 19 b, Confirmation under the Great Seal of England of preſentation to a Church in Ireland, of the heir of the tenant of the King; and that a diſpenſation under the Great Seal of England, is good in our caſe, without any patent of it in Ireland, vr. 8. Aſſ. 27. 10 E. 3. 42. An exchange of land in England for land in Ireland is good. Note 20 H. 6. 8. Scir. fac. ſued in England to repeal a Patent under the Great Seal of Ireland, vr. the Iriſh Statute 2 El. 2. cap. 4. That an Iriſh Biſhop may be made under the Great Seal of England. Note Stat. 1 E. 6. The Iriſh Biſhops ſhall be donative by Patent by the King under the Great Seal of England; Yet the King may let them be choſen per congedeſtier, &c.

1. Noy argued at barr, and ſo ſtated the points of the ſaid caſe by themſelves, If a commendatory Dean by recidere in commend. may well confirm a Leaſe made by the Biſhop for it is agreed, that a Commendatory Dean by recipere in commend. cannot confirm because he is but a depoſitarius. Note 19. H. 6. 15. 12 H. 4. 20. 27 H. 8. 15. A commendatory ſhall be ſued by that name, and by ſuch a commend. he may take the profits and uſe Juriſdiction, and yet is not a Dean compleat. Note he may make a Deputy for viſitation, but not for confirming of Leaſes. Note if there be two Deans in one Church, both ought to confirm. vr. Dy. 284. Coo. Juſti: 30. 2.

2. The ſecond point, If ſuch a Biſhop, be choſen to another Biſhoppric, if now the firſt Church in Commend. (admitting that there was a full incumbent) be void preſently by the election and aſſent of the Superiour (viz.) the King. And it ſeem'd to him that it was; Becauſe there need not be a new conſecration. And he vouch't Panormitan 2 part 101. The Biſhop of Spires was choſen Biſhop of Trevers, and had the aſſent of the Pope, and that he came to Trevers, and there found another in poſſeſsion, And he would have return'd to the former Biſhoppric, and could not. And he alſo cited the 8 Rep. Troblops Caſe, That the Wardſhip of temporalties ceaſe by the election of a new Biſhop. Note that Serjeant Heanden who argued on the contrary, vouch't. M. 4. Jac. May, Biſhop of Carliſle made a Leaſe to the Queen, and a Commiſsion iſſued out of the Exchequer to take it, And the Dean and Chapter confirm'd it before the inrolment of it. And yet adjudged good, That Caſe was for the Caſtle of Horne.

Firſt, The Judges argued two days; and reſolv'd that al Commendams are diſpenſations, And that ceſsion commend'd by the Canon and Councill of Lateran.

Secondly, That the King may diſpence with that Canon. 11. H. 7. 12. For the Pope might, and now by the Statute 21 H. 8. that power is given to the King commulative, by way of erpoſition veteris, and not by introduction novi juris, And by that Statute a concurrent power is given to the Archbiſhop of Canterbury, and may be granted by the King, or by the Archbiſhop, &c.

3*ly*, That that diſpenſation, after election to the firſt Biſhoppric and before

ſore conſecration, &c. and alſo the diſpenſation, after election to the ſecond Biſhoprick, and before the confirmation, is good enough in both Caſes, and he remains a good Dean to confirm, &c. And afterwards the Judgement in the Caſe, being an action of treſpaſs, was given accordingly.

Note, that Biſhopricks were Donatives by the King, untill the time of Will: Rufus, and ſo untill the time of King Iohn. Read for that the Hiſtory of Eadmerus.

Alcock *againſt* Blowfield.

A. had recover'd 50 l. againſt M. and then B. promis'd, that if A. would forbear execution of it, that he would pay to him 50 l. at Midſummer next, or 100 l. after, if it be not paid then &c. when it ſhould be reaſonably requeſted, and A. avers non-payment with a licet ſæpius requiſitus, (but does not aver a requeſt expreſſely) and recover'd. And now upon errour it was agreed, That the requeſt ought to have been expreſly averr'd; Becauſe that was iſſuable. For the promiſe being made by an Eſtranger, there, there is not any duty before requeſt. But otherwiſe when the party himſelf which is indebted promiſes to pay, There a licet ſæpius requiſ. ſhall ſuffice; Becauſe there was a duty before, and without the promiſe. But in the caſe of an Eſtranger it is nudum pactum, and no conſideration until a requeſt made. And for a promiſe where there was a precedent debt, &c. There needs not ſuch preciſe ſhewing, for what thing, or how the debt accrued. As upon an aſſumpſit upon an Indebitatus exiſtit, or inſimul computaver. becauſe that is only an Inducement. 5 H. 7. 1. 21 H. 7. 15. 9 E. 4. 41. *Intr. P. 3. Car. B. R. rot. 213.*

Scarreborrow *againſt* Lyrius.

L. being in a ſhip upon the Sea, B. who was in it was reputed an Agent and Factor, borrows 100 l. of L. upon Bottomage, (that is) when the money is paid upon the Keel of the ſhip, and the ſhip obliged to the payment of it; And if it be not paid at the time, &c. that he that lends the money ſhall have the Ship. And that was allowed to be a good and neceſſary cuſtome he all. And it was agreed by the Juſtices, that if the Maſter, Factor, Purſor, or hee that is reputed owner of the Ship borrows money in ſuch a manner, for the neceſſaries of the ſhip, that binds the owner of the ſhip, although that the money be not ſo imployed in truth: and the owner hath his remedy againſt him that he ſo put in truſt. And it is not a good allegation for to have a Prohibition, to ſay, That the property was not in him, that took ſuch Bottomage.

Ferrey *againſt* Newton.

The Plaintiff in an Ejectione firm. in the Common Bench had judgment quod recuperet termin. and a writ of enquiry of damages. But before the return of that errour, was brought. And it was reſolv'd that the errour is well brought before the writ of enquiry of damages return'd. Becauſe the Judgement was principally given for the thing it ſelf. Otherwiſe if only damages had been recover'd, then they were the principal. Alſo in our caſe the Plaintiff by the Judgement might enter without ſuing an habere fac. ſeiſinam, or a writ of enquiry of damages. Now at barr ſaid, that they in the Common bench, upon the return of the writ of enquiry of damages there may well proceed. And Judgement given for the damages in our caſe. *Intr. M. 2. Car. B. R. rot. 118.*

Surrey *against* Coles.

Intr. P. 22 Jac. B. R. rot. 62.

THe main point of the case was, A. leases to B. for years, reserving a rent annually durante termino prædicto to the Lessor and his assigns. A. grants the reversion over to S. in fee &c. and dies. If now the rent be determin'd. And these cases were vouched, M. 3. Jac. C. B. Barker against Barret. A. leases for a year, and so from year to year; Reserving for that so long as the Lessee shall enjoy it, 10s. rent. The lessee after the first year dies, his Administrator enjoys it another year. And adjudged that he shall be charg'd for the rent. And P. 4. Jac. C. B. rot. 112. or 112. Hill against Hill. The husband leases for years, reserving a rent yearly, during his life and the life of his wife, and dies; The wife by custom had that land as Frankbank, and in debt recovered the rent. And Worton against Eggwin was vouched. A. leases for years, reserving a rent to the lessor, his executors and assigns, and dies; and his heir distrains for the rent, and adjudged not tortious (note the fault annually) For it was adjudg'd in the Chancery in the case of Winch against Winch. Where the rent being upon a lease for years reserv'd to the lessor and his Executors (annually qu.) that was decreed to the heir.

Crossman *against* Hume.

Int. M. 2. Car. B. R. rot. 471. & 161.

IN Errour, upon a Judgement in the Court of Lanceston in Cornwall. Errour assign'd, because the venire fac. was de viceneto de Lanceston, where it ought to have been of Lancest. For their jurisdiction does not extend but to the village of L. ve. 8 H. 5. That a superiour Court hath a superintendency, and may award a venire fac. de viceneto. But otherwise of a particular Jurisdiction. There the Enquest is coram non judice. And so note the case. As administration by the Inferiour Ordinary, where there are bona notabilia is void. And so it was rul'd.

Wood *against* Brooke.

Intr. P. 2. Car. B. R. rot. 383.

IN an action upon the case, the plaintiff declares to 17 l. damages, and upon Demurrer, judgement given for 17 l. 10s. for his damages by the Court. And now that Judgment was reversed. Because the damages being uncertain, there ought to issue a writ of enquiry of damages. Otherwise where the demand is certain, as in debt. Note, 11 H. 7. 5 b.

NOte by the Court upon an Arbitrament, The Defendant shall be ousted of waging his Law, Kellw: 39. And the reason, Because a third person hath notice of it. But 1 H. 7. 25. a. is to the contrary.

Thare *against* Fosset.

M. 3. Car. B. R.

F. sues T. in the Court of the Verge, and declares of a trespass in St. Martins, infra jurisdictionem of that Court. And upon issue of not guilty, a venire fac. was awarded from St. Martins aforesaid, without saying infra jurisdictionem. And there recover'd. And now in errour, It was held by the Court to be errour, Because the Court varied and altered the limits of its jurisdiction, according to the residency of the King. And St. Martins at the time of the trespass might be within the verge

vierge and jurisdiction, and at the time of tryal might be out of it. For that is a removeable jurisdiction.

Grewell *against* Ireland.

IN Battery the Defendant pleads, quod vi et Armis, &c. not guilty, without saying, Et de hoc ponit se super patriam: And as to the residue, &c. of his own assault; The Plaintiff replies that the Defendant vi et armis in ipsum insultum fecit, &c. Et hoc paratus verificare. And issue taken upon that, &c. and it was found for the Plaintiff, and well, and it is no discontinuance, for also the vi et armis, &c. is in issue; and the Defendant shall be fined to the King. *Intr. M. 2. Car. B. R. rot. 130.*

Longely *against* Street.

THe Plaintiff declares of an action of Trespasse in the time of King James, contra pacem Dom. Regis. And it was now mov'd after verdict for the Plaintiff in arrest of Judgement, and not allowed because it is brought tarde. But otherwise it had been, if it had been mov'd before verdict either, when the Jury was at barre: For, for that they shall be dismissed. As it was borne in one Drake's Case, vouch'd by Serjeant Davenport. And see for that purpose 2 E. 4. 23 a. The Statute of Jeofailes. *Intr. H. 1. C. B. R. rot. 470.*

Ironmonger *against* Newsam.

THe point was, Lessee for years rendring a rent dies, The Executor assigns the term over, the rent is arrear, the lessor brings debt against the Executor. And by Noy and Mr. Mason that it lies. 3 Rep. 64 a. Sydal's Case, and Marrow's Case there also was cited, and so adjudg'd. And by Noy in his argument, the 10 Jac. B. R. Sir Thomas Walker's Case was vouch'd, where a Freeman of London imports wines, and before the landing of them he dies. His Executor shall not pay Pasage. And that so it was adjudg'd, although that the Executor was not a Freeman. Which Justice Doderidge also affirmed.

Slade *against* Drake.

SUch a prohibition against Drake, alleging that an Abbot, &c. was seised, &c. of that land discharg'd of the payment of tithes at the time of the dissolution, and so conveyed it to the King, and from the King to him. The Defendant demurrs, and it was resolved that the Abbots holding of it discharg'd of tithes, &c. was not good, without shewing how. For note the Statute 31 H. 8. cap. 3. is in as large and ample manner as the Abbot held it, &c. and the Statute pinches upon that, ergo he ought to take notice by what manner the Abbot was discharged; also such a claim of discharge of tithes, is contrary to Common right, and therefore shall be strict. ve. 21. H. 7. 9. He ought to shew how he was discharg'd of the rent. 5 E. 4. 6. a. He ought to shew how he is more next of blood, for entry for consent of Ravisher, 35 H. 6. Replevin 46. He ought to shew how the Plaintiff is seis'd of the part of land, out of which the rent issues. So if the Abbot had it then for life or for years; and no reason that the inheritance shall be discharg'd for that. Note 22 E. 4. 40. He ought to shew how he hath discharg'd the annuity. See and Note 9 rep. 35. and 9 E. 4. He ought to shew before what Judge the Abbot was deposed; and so by what Judge the Vicaredge was sequestred. 5 E. 4. 28. b. 10 H. 7. 17. *Intr. H. 15. Car. C. B. rot. 418.*

he ought to ſhew the hereſie, &c. 26 H. 8. 1.

2. He ought to ſhew what eſtate he hath made, &c. 5 rep. 57. And by Hubbard chief Juſtice, that 31 H. 8. cap. 3. hath created a diſcharge of tithes, (viz.) by a perpetual unity, which was not before at the Common law.

Plummer *againſt* Webb.

E. 8. A. Licences P. to put a ſtack of hay upon the land of A. A. leaſes that land to W. and the hay remains there for 2 years, and W. puts in his Cattel who waſte the hay, and P. brought an action of treſpaſſe, and adjudged that it does not lie.

1. Becauſe it was not remov'd in convenient and reaſonable time, and the licence is determined by the leaſe to W. and P. at his peril was bound to look that the beaſts of A. or W. his leſſee did not eat the hay. And ſo the damages comes to him by his own fault.

Jelliet *againſt* Broade.

M. 18. l. c B. R. I. Sells goods to B. for 200 l. and in conſideration of that bargain B. promiſes that he will not exerciſe the trade of a Mercer in ſuch a Village, &c. But after B. uſes it there, and I. brought an action upon the Caſe, and reſolv'd by the Court, that it well lies. For it was a voluntary promiſe for a good conſideration, and is reſtrained to a place. Otherwiſe if it had been a general reſtraint, or upon a coaction, or without conſideration. As 2 H. 5. 5. b. Note alſo, M. 43. and 44. Eliz. Common Bench, rot. 3217. Leggate *againſt* Batchelour. The Condition of an Obligation was, that if the ſon of the Defendant uſ'd his trade, &c. within the County of Kent in the Town of Canterbury or Rocheſter, within 4 years, That then if he payd 20 l. the obligation ſhould be void. And it was ſaid by all the Juſtices, that that condition is againſt the Law and liberty of a ſubject by Magna Charta cap. 38. And contrary to the Common good.

Murton *againſt* Burtley.

18 Jac. in Exchequer Chamber. An action upon a promiſe to pay the arrerages of rent, upon an inſimul computaſſent when he ſhould be thereunto requeſted. And hath not expreſly alleg'd a requeſt, and yet adjudg'd good, for the arrearages are due before the requeſt, and an action of debt lies for them. And alſo the bringing of an action is a requeſt ſufficient; That was mov'd in arreſt of Judgement, and yet Judgement was for the Plaintiff. But otherwiſe it were if it had been to do a collateral thing, which was not a preſent duty. As to deliver an Obligation or an Indenture upon requeſt; There he ought to ſhew a requeſt expreſly, with the place and time, for it is iſſuable, and a licet ſæpius requiſitus is not ſufficient.

Preſtons caſe.

An action upon the caſe by a Counſellour at Law for theſe words, Thou a Barreſter', Thou a Barretter, thou call'd to the Bar, Thou wert put from the Bar. And Judgement for the Plaintiff. And upon error now alſo it was affirm'd although he did not ſay common Barretto', nor that he was put from the Bar for juſt cauſe. And it was ſaid by Lanfield it hath been adjudg'd that an action lies for ſaying, Thou art a Daffidowndilly (innuendo) an Ambidexter, in reſpect of his profeſſion. 4 rep.

In

In the Star-chamber.

Gillibrand *against* Hubbard.

H. Levies in the name of G. he being over-sea. And sentence was given, That the fine shall be void. And Poph. cited Holcombs case. A. acknowledges an action in the name of H. and sentence was also given that (vacat) shall be made upon the roll. And a fac. Serjeant Heals case. He had unduly sued an execution, upon Judgement in debt, acknowledged by the Lord Cobham. And afterwards the Lord Cobham was imprison'd for treason. H. fines an Elegit. And there sentence was: That the Record of it should be vacated; and Serjeant Heale was fined deeply for that practice. M. 38, 39 El.

Strangwaies *against* Hicks.

H. knowing that Str. was within age, procures him to acknowledge a recognisance for wares bought, &c. Str. dies, and his wife sues H. in the Star-chamber. And H. was fin'd one hundred pound, &c. And Calmaders Case against Here was vouch't for a president of the Court in the point. P. 41. Eliz.

Sir Edward Meredith against his tenants.

The Defendants were fin'd for making an obligation between them, the one to the other, to contribute to expences in suites commenc'd or to be commenc'd, by the Lord against any of them. And this difference was agreed. That for suite, for customs common or copyhold, whereof the Obligors a participate, there they may contribute. But not in the case where they claime several Frank-tenements, or Copyholds of inheritance in which they have not a joint and equal interest. vc. 1. E. 4. 2.

The King *against* Crooker, Higgins, et alios

The under Sheriff of Oxford had process of extent upon a Statute-staple of goods and Lands, of Crooker. And the under Sheriff gathers the goods together, and the Defendants endeavour to rescue, but did not prevail. And now they were censur'd for that, notwithstanding that the under Sheriff had not taken an inquiry by the Jury, and although that it was before the appreciari fac. &c. for before such inquiry, &c. the Sheriff ought to gather the goods together, for to be view'd by the Jury, by the Law. But the final power of safe-guarding, &c. in the custody of the Sheriff is not good, untill after the enquiry; And it is not material although they did not prevail, &c. For conatus punitur. Also the Fine of Crooker was aggravated, because he said to the Sheriff (shewing his knife) put up your bauble. M. 41. 42. Eliz.

Bloch *against* Allen.

B. was oblig'd in one hundred pound to A. for the honesty of his Sonne an apprentice with A. And A. in the obligation races out liberis and puts in March. That is not forgery punishable. For it is not a prejudice to any but himself. For by that the Obligation is void, and hath lost his own duty. And so decreed. And the Lord Keeper and the two chief M. 42, 43. Eliz.

chief Justices, saying that if the Defendant pleads not guilty, he shall not have the benefit of the general pardon at hearing. But he ought to plead that, and shew that he is not a party excepted in that; But he needs not shew, that the offence is excepted. For the Judges, ex officio, ought to take notice of the offences excepted, but not of the persons.

Stepney *against* Wolfe.

H. 43. Eliz. A. was oblig'd as a surety with W. and W. for that, and to save A. harmless makes a Deed of gift of certain barbits to A. Stepney takes them, and A. sues him, but W. maintains the suit and charges; and at the time of the taking and suit for it. The day of payment of the obligation now was come: And yet by the Lord Keeper and the 2 ch. Justices, that is no unlawful maintenance: But justifiable, in respect of the trust that was reposed in A. by W. to re-have the B[illegible] if A. be not damnified, &c.

Agars Case.

M. 43. 44. Eliz. He was receiver of certain rents of the Queens, payable at Easter, or within 40. days after. And upon Enquest of the Office, for condition broken for non-payment, he deposes, that the rent was not paid within the 40 days, but after. But he had antidated his acquittance. And it was agreed,

1. That the Queens Attorney may inform for that perjury; although that it be an oath made for the Queens advantage; So for any other if he be grieved by it.

2. That the perjury before the enquest of the Office, is a misdemeanor punishable in that Court; but not by the Statute 5 Eliz. and the Court held that antidating to be a great offence. But no censure of that, because it is not complained of in the bill.

Note, that in that term it was also rul'd, that if one exhibite a bill or an Information, and is not the party aggrieved, As an Informer upon a penal Statute or a misdemeanour, If he dies, his Heir, Executor or Administrator, shall not have a bill of reviver, but Mr. Attorney General may.

Rye *against* Foltcumbe.

H. 44. Eliz. F. being divorc'd for incontinency of the wife, he afterwards marries P. the daughter of Rye, living the first wife. By the whole Court that is a void marriage; For the divorce is not, but à mensa & thoro, and does not dissolve vinculum matrimonii. And by Whitgift Archbishop of Canterbury. So is the opinions of Divines and Civilians.

H. 2. Iac. 13. Feb.

Before many Noblemen, Archbishops and Bishops, and the Justices and Barons of Exchequer.

1. Agreed that the Deprivation of Puritan Ministers for Non-conformity to the last Canons, was lawful by the High Commissioners. For by the Common law, the King hath such a power in causes Ecclesiastical. And it is not a thing de novo, given by the first of Eliz. For that is declaratory and up, &c. and the King may delegate it to Commissioners.

And

And the King without a Parliament may make conſtitutions for the government of the Clergy: and that ſuch a deprivation ex officio, without libel, is good.

2. That the Statute 5 H. 5. cap. 4. is to be intended, when they proceed upon libel, and not when ex officio. Read the Statute.

3. When their Petition ſubſcrib'd by a great number, with intimation, that if the King denies their ſute, that many thouſands of his ſubjects ſhall be diſcontented. That is an offence finable at diſcretion, and is near to treaſon, by raiſing ſedition by diſcontent, &c.

Bellew *againſt* Bullocke.

The Defendants upon a riot, in deſtroying 16 foot of an hedge for a Commoner. There they were fined every one 40 s. And the Plaintiff for ſuing in that Court for that ryot was fined 20 l. And ſo both parties fined, which was ſeldom ſeen before.

Combes the Defendant,
the ſame day.

For a forgery of a Will of one Brokenburye, It was held by Popham, Flemming and Yelvert. That if he that writes a Will, omits a thing that was appointed to be put in, that is not Forgery: But if the deviſe had been to A. for life, the Remainder to B. in Fee, And he that writes the Will omits the Eſtate for life to A. by which the Fee is preſently to B. that is Forgery. 44 *Eliz.*

Stockwells Caſe.

ST. was Deputy Purveior for the Topl, and was fined for miſdemeanours, &c. Note in that caſe, by Poph. who delivered the opinion of all the Juſtices of England in theſe 3 points.

1 That no Purveyor or his Deputy may take any thing, without ſhewing of his Commiſſion.

2 That they cannot take wood or trees growing, without the conſent of the owners; Becauſe they belong to the Freehold.

3 That no Purveyor may take that which a man hath provided for his own proviſion: but of that which is to be ſold, the King ſhall have the buying at reaſonable prices. ve. 47 E. 3. 18. 11 H. 4. 28. Mag. Chart. cap. 21. And in 25 E. 3. B. R. rot. 27. The ſervants of the Marſhall preſented for taking 12 carts for to carry the Kings priſoners, where one would have ſufficed. And they had levied to 10 Marks for the redemption of their Carts and horſes; For which they were Committed to the Marſhalſea, &c.

Doydige *againſt* Penkvell.

P. was cenſur'd, for inverting the name of a ſpecial Bayly, in a warrant made with a blank by the Sheriff. And note, that in that caſe, as alſo P. 4. Jac. An Information by Mr. Atturney, againſt Willoughby and others, for many riots. One was cenſur'd, and the others diſmiſt with coſts againſt the Relator Mrs. Gawen.

The Lord Sturton and Lord Mordant.

H. 4 Jac. THey were brought to the barr now, being held for a contempt to the King for not coming to the Parliament by prorogation 5 Novemb. when the Gunpowder treaſon was intended: And it was grandly ſuſpected, that they knew of the Plot, becauſe they were Papiſts, and their excuſes very frivolous. And St. was fined to 6000 marks, and Mor. to 1000 marks.

Stockwell *againſt* North.

N. was Sheriff of Nottingham 43 Eliz. and took money for the offices of Gaoler and Bayliwick, and he firſt gave them to his ſervants, who ſold them; But he himſelf had the money; and he was fin'd for that, for it is contrary to 4 H. 4. cap. 5. And alſo by the Court; That that is a corruption, and a great cauſe of oppreſſion in the Officers; and ſuch ſale of offices is malum in ſe, and finable.

Sir Thomas Palmers Caſe

T. 9. Jac. FOr forgery, in that caſe this aroſe, and it was reſolv'd by the 2 ch. Juſt. and the ch. Baron. That whereas Sir Tho. had covenanted by Indenture, for natural affection, To ſtand ſeiz'd to himſelf for life, the remainder for life to F. the eldeſt ſon of his brother, the remainder to the firſt ſon of the ſaid F. and ſo to the 8th ſon, &c. the remainder to the right heirs of Sr. Tho. Palmer. Sir Tho. is attainted of treaſon, and executed before the birth of any ſon to F. That the Sons born after are all utterly barr'd by that Attainder. And the King ſhall have the Fee diſcharged of all the remainders limitted to the ſons not yet born.

I. was Plaintiff in an action againſt F. makes a breviat of the cauſe, and delivers it to ſome of the Jurors before their appearance for their inſtruction. And the Plaintiff after evidence was non-ſuited; and for that he ſues them. And now reſolved by the Lord Keper, and the 2 ch. Juſtices.

1. That the party himſelf might labour with the Jury to appear, but not a ſtranger.

2. That the party himſelf cannot inſtruct, or promiſe reward for, or before appearance; For that is imbracery, a fortiori, in a ſtranger, and the Defendants were fined and cenſured.

H. exhibits a Bill for forging of a Will againſt Turvil, and others. hearing. He relinquiſhes the forgery, and inſiſts upon a practice between them to draw the party to make that will. And by the Court that he cannot inſiſt upon the practice, for that is but a circumſtance of the forgery. But otherwiſe if he had confeſt the will, and charg'd them directly with the practice. And now the bill was diſmiſſed, and the Plaintiff fined 200 l. to the King, and ſeveral damages to every of the parties. Becauſe they have not a remedy for thoſe ſlanders (being before a competent Judge) at the Common Law. 4 rep. 14 b. And it ſeem'd that that was the firſt preſident for damages, for a ſcandalous bill.

Hind *againſt* Manfield.

M. Was fin'd to two hundred pound, for diverting part of the River of Thames, by which he weakned the Current of the River to carry Barges, &c. towards London and other houſes of the King upon that River. And ſuch a thing cannot be done without an ad quod dampnum. Regiſt. and N. B. Becauſe that River is as an high way. And alſo it ought to be by patent of the King, for to do ſuch a thing. 18. 12. Jac.

Whinnel *againſt* Strowd.

W. exhibited his bill againſt St. for a miſdemeanour in his office of Juſtice of Peace. As for compounding of matters between the parties, being bound over to the Seſsions. And now the Court obſerved this difference; That for petty quarrels between party and party, or for the peace, or petty treſpaſſes, where the King is not to have a Fine, There a Juſtice of Peace may make and perſwade an agreement between the parties. But otherwiſe where a fine ſhall accrew to the King.

Breerton and Townſend upon a ſpecial day.

An information by Mr. Attourney againſt Sir Thomas Breerton, Richard Breerton his brother, and Sir Henry Townſend and his wife, for the ſuppreſsing of a will, &c. And all the Defendants but Sir Henry Townſend were fin'd to the King, And the Court aſſeſt and gave 3000 pound damages, to one Egerton the Relator, whoſe wife was diſinherited, &c. And in that caſe theſe three points were mov'd and agreed. T. 12. Jac.

Firſt, That proceſs ſhall iſſue out of that Court to the Sheriff to levy the damages, to the party or to the Relator, upon the Goods and Lands of the parties, and many Preſidents were there vouched for that point. T. 12. H. 7. Hales againſt Sherley, H. 10. H. 8. Bradſhaw againſt Suitor. And it was now decreed that Proceſſe ſhall iſſue to the Sheriff to levy the three thouſand pound upon the Lands of Breerton.

Secondly, It was decreed, that Proceſs ſhall iſſue againſt Sir Henry Townſend the Husband, to pay the damages for his wife. Note, Bacon the Atturney having extold the dignity of that Court, where many Kings in perſon have ſate, and is compoſed of the chiefeſt Counſellors of State, of the chiefeſt Divines, and of the chiefeſt Sages of the Law, and hath a tranſcendent Juriſdiction. That now if the husband ſhould not anſwer for the damages againſt the wife, As in treſpaſs or in an action upon the Caſe they ſhall, It would be an incouragement to Feme Coverts, to commit all manner of Outrages. But the two chief Juſtices and the chief Baron, and the Lord Knolls were of a contrary opinion in thoſe two points; But they agreed with the others, that the body goods and land of the party, may be taken for a fine to the King, by the Common Law, But not by Proceſs out of that Court. But upon an eſtreat into the Exchequer, Proceſſe ſhall iſſue thence, But not for damages of the party. And they gave this anſwer to the Preſidents: becauſe in ſome of them the damages are part of the decree, and given to them that were parties to the ſute, But in our caſe the damages were given to the Relator, who is a ſtranger, and by that means he ſhall be in a better plight then the King; Who muſt ſtay till his fine be eſtreated

ſtreated into the Exchequer. And alſo by the Judgement. That the husband ſhall not anſwer for the damages given againſt the wife. Becauſe it is a criminal and not a civill offence; As battery, ſlander or aſſumpſit by the Feme Covert.

3. It was decreed by all, that an Injunction ſhall iſſue againſt him that ſtood in contempt, to ſurceaſe all ſutes in other Courts concerning the ſame thing or cauſe, for which the originall ſute was in the Star-chamber, and alſo againſt the ſame party, at whoſe ſute he ſtood in contempt in this Court; until he had obey'd the decree: But not a generall injunction, for all ſutes, for any thing, againſt any other perſon. As the baron had urg'd to be reaſonable: as well as outlary, or excommunication in other Courts are pleadable by any man, in many actions. A Fortiori, for a contempt againſt him in the High Court of Starre-chamber. And note, that the party grieved was preferred in his remedy for his damages, before the King for his fine.

Hawkins *againſt* Harris.

M. 12. Jac. HArris was fin'd to 200 l. for practiſing with the Maior of Laskree in Cornwall to be unduly choſen to be a Burgeſſe of Parliament; and alſo came in to the Common Hall, and ſat there upon the bench with the Maior. And although he was elected by the leſſer number, yet he took the book and ſwore himſelf; and being a Juſtice of peace, ſhewed a diſcontent, and threatned in his Geſture and countenance, againſt them that gave their voices againſt him.

Day *againſt* Beddingfield and others.

VPon a cradle bill in that Court between the parties, for pulling down of painted glaſſe, pictures and arms, in a window in an Ile of a chapel, in the pariſh of Wellington in Somerſet, Theſe points in the caſe were reſolved.

1 If an Inhabitant there, and his Anceſtors time out of mind, &c. have us'd to repair an Ile in a Church, and to ſett there with his family, &c. and to bury there, that makes that Ile proper and peculiar for his family. Otherwiſe if he had not us'd to repair it at his own coſt, but with the charge of the pariſh. Then the Ordinary may appoint who ſhall ſit there from time to time, notwithſtanding a uſe to ſit there, only, to the contrary.

2 If any ſuperſtitious pictures are in a window of a Church, or Ile, &c. It is not lawful for any to break them, &c. without licenſe of the Ordinary; and if any does to the contrary, he ſhall bind him to his good behaviour. And ſo it was in Prickets caſe.

3. That the Ordinary or Churchwarden cannot licence a pariſhioner to bury within the Church: But it ought to be licenced by the Parſon; for the Franktenement is in him only.

4 If coats of Arms are put in a Window, or upon a Monument in the Church or Churchyard, They may not be broken by Ordinary, Parſon, or Churchwarden, or any other. For the heir ſhall have his action upon the caſe for that, 9 E. 4. 14. For they are, and belong to him, 30 E. 3. 9 b. c.

5 If one be aſſaulted in the Church, or within a Churchyard, he may not beat the other, or draw a weapon (although it be in his own defence) there, For it is a ſanctified place, and he may be puniſhed for that by 2 E 6. And ſo if in any of the Kings Courts, or within view of the

Courts

Courts of Justice; Because a force in that case is not justifiable, though in his own defence.

Oliver St. Johns Case.

About Octob. 12. Iac. A Commission for benevolence issued to the village of Marleborough, for to collect, &c. And St. John being requir'd to contribute, absented himself, and writ a letter to the Maior, &c. That such benevolences were contrary to law, ve. Magna Charta cap. 29. and 25 E. 3. cap. 26. And that it is contrary to the oath of the King at his Coronation; And that the breach of that was the chief reasons urg'd by H. 4. *against* Richard 2. which was the cause of the Barons warrs, &c. and much to that purpose. And for that being urg'd to be near to treason, he was fined to 5000 l. But after his recantation he was pardoned by the King, &c. And now the presidents of such a Commission, &c. were produced. Note well that case.

Poulton & al. *against* Wiseman & alios.

A Bill exhibited upon 27 Eliz. cap. 4. of Fraudulent Conveyances; in which these points were resolv'd.

1 That where Wiseman had agreed for 1000 l. paid by one Thompson to assure 100 l. per annum to him, &c. during his own life and his wives: And for assurance of that a Mortgage was made, although that Wiseman and others did not pay the money, yet are they purchasers within the Statute of 27 Eliz. Because they are nam'd as parties in trust for the benefit of Thompson.

2. That the Estate which they had upon that Mortgage, was a sufficient purchase within the Statute.

3 That one entire years profits, which is the penalty of the Statute, shall be forfeited without apportionment; as well upon a Mortgage as upon an absolute sale. So also upon a lease or a petty Annuitie made by Fraud, &c. One years value of the land shall bee forfeiten.

4 That every Defendant that is found guilty, shall pay a years value of the Land, every one by himself; and not a years value joyntly amongst them all. Note and read the Statute (Also and every offender, &c.)

5. That the infancy of one of the Defendants shall not excuse him of that penalty, he being of 16 years, and privy to that Conveyance, and having justified that Fraudulent deed to be made bona fide, And for that he shall be punished as if he were at full age.

6 The Bill being preferr'd only upon the Statute of 27 Eliz. That the Court of Starre-chamber could not encrease or diminish the penalty of the Statute, nor impose a Fine for the King. For that the Lord Chancellor advis'd that all such bills should be fram'd upon a Statute, For to have such punishment as the Court of Starre-chamber shall inflict.

Thomas Valley *against* Richmond.

P. 1 Iac.

V. Brought an action upon the case against R. because he had inticed his Prentice, (he being a tradesman in London) to depart from his service, for 6 days: and divers times to take money out of the box of the shop, and play at Cards with R. and that R. cozened the apprentice: And it seem'd to the Court, that the Master might well have an action for

Intr. M. 43. & 44 Eliz. C. B. rot. 3172.

the departure, and loſing his money is a damage to the Maſter; and the Coſenage is not but an aggravation of the offence. And for that the ſervant himſelf only ſhall have an action. But yet in our caſe becauſe the damages were intire, with a reſpect to the Coſenage, as well as to the departure, The Plaintiff could not have Judgement, by the better opinion of the Court. And ſo the matter was referred to Arbitrament.

The Lord Norris's Caſe.

TEnant in tail of a Manor wherein Coppholds are demiſable for life, &c. for a certain rent. The Coppholder for life dies, and the Lord demiſes it by Indenture for 21 years rendring the ancient rent, &c. And by the better opinion of the Court it is good, within 32 H. 8. For it is not any prejudice to the iſſue as to the rent.

Dalby *againſt* Spooner.

Intr. H. 54. Eliz. C. B. IT was reſolved that a grant of omnia bona et catalla ſua. That the goods that the grantor hath as Executor to I. S. ſhall paſſe. ve. 10 E. 4. 1. 19 H. 6. 4. Plo. 289.

Weeks *againſt* Carvel.

T. 44. Eliz. C. B. rot. 1744. IN a replevin, the caſe was thus. A. ſeis'd in fee of Burrough Engliſh land, demiſes it to B. his ſon in tail, and dies. B. dyes ſeis'd having iſſue two ſons. And by the Court it was reſolved, That the youngeſt ſon ſhall inherit as well to the tail as to the fee-ſimple. So all the iſſues ſhall inherit an eſtate tail in Gavelkind land. ve. Litt. 107. Dy. 176. 26 H. 8. 5. 22 E. 4. 10. b.

NOte, that if the Debtée makes the Debtor and A. his Executors, A. proves the will and dyes. The Debtor refuſes before the Ordinary. And after an action is brought againſt the Executor; and by the Court the Debtor may plead ne unq; Executor. For he is diſcharg'd in law, there being no adminiſtration to charge him. ve. 21 E. 4. 81. b. Note, in T. 2. Iac. in C. B. In an action of debt againſt an Adminiſtrator, he pleads that the Teſtator was indebted to him; and over and above, which ſum he hath not to ſatisfie, &c. And by the Court that is a good plea, and ſafer than to plead, plene adminiſt. &c. For by that plea it may be tryed.

Bradſhaw *againſt* Bokingham.

Intr. M. 43. 44. Eliz. C. B. rot. 155. IT was adjudg'd that if a Commoner incloſes part of the waſt, in which he ought to have Common, That by that all his Common is extinguiſh'd, ve. 11 H. 6. 21. 19 H. 6. 11.

Bellingham *againſt* Alſopp.

ADjudged, that if the bargainee before enrollment bargain and ſell the land to A. And within the 6 months reſpectively both the deeds are enroll'd. That the bargain and ſale to A. is not good. And by Walmſly: If the diſſeiſor bargain and ſell, and the diſſeiſee releaſe, &c. to the bargainee. And upon evidence agreed by the Court, That if the Bargainor continue poſſeſſion after inrollment

that

That he is a diſſeiſor. For the Statute tranſferrs the Franktenement to the Bargainee.

Backwell *againſt* Hunt.

IN an accedas ad Cur. in falſe Judgement, where the writ was in propria perſona, &c. the Sheriff or Under-Sheriff ſends his ſervant with the writ, &c. And they of the Court of Shrewsbury refuſe to certifie. And the Court that the Sheriff ought to return it ſo, that they have refuſed. Upon which a diſtringas ſhall iſſue, &c. For the writ was well ſent by the Sheriff with his ſervant. vc. N. B. 18. a. b.

Waller *againſt* Weedale

T. 2. Iac. C. B.

IN decinae the caſe was thus. A. had recovered in debt againſt W. and execution awarded to the now Defendant being then Sheriff of Southampton; Who takes the goods, &c. and returns a fieri fec. et denarios habeo, but none of the goods were ſold before the return, but the Sheriff kept them in his hands: and Judgement nolo for the Plaintiff. For the Sheriff cannot retain the goods taken upon an execution in his own hands, and ſatisfie the debt of his proper money. But he ought to ſell them upon a venditioni exponas, and may return upon his ſo doing, quod non invenit emptores; for a grand inconvenience would enſue, if the Sheriff himſelf might retain them. Intr. M. 44, 45. Eliz. C. B.

Harvey *againſt* Gulſon.

Hil. 1. Iac. C. B.

IN a replevin, the Husband being ſeiz'd in right of his wife, for damage feaſant in his own name, and that the other are ſervants to him, &c. And that was rul'd to be good, without ſhewing as ſervants to the wife alſo.

2. That if A. hath a Cloſe next to the Highway, and beaſt come out of the Highway into the Cloſe of A. e there-hence they enter into another Cloſe of B. adjoyning, and that B. ought to fence, There in default of encloſure, &c. it is a good plea againſt A. but not againſt B. or another ſtranger, &c. vc. 36 H. 6. barre 168.

Beckett *againſt* Bromely.

IF A. brings partition, and by that demands the 4th. part, &c. and if the Jury find that they hold pro indiviſo; but that A. ought not but to have a 5th. part, &c. yet ſo A. ſhall not have that which is due to him; for the Judgement ſhall be variant from the demand.

NOte that in a Quare impedit, If the venire fac. be return'd, the Plaintiff cannot be non-ſuited without calling of the Jury. But if the venire fac. be not returned at the day, then he may be non-ſuited upon the Roll, without calling of the Jury. But otherwiſe alſo in the firſt cauſe by conſent of the Plaintiff himſelf. Becauſe conſenſus tollit errorem.

Hol-

Holland *againſt* Heale.

A Libel in the Spiritual Court for the tithes of Pilchards taken in the Sea. And now the party had a prohibition; Upon a ſurmiſe that the cuſtome there is, that the owner of the Fiſher-boat, hath one moyety of the Fiſhes, and the Fiſhermen the other moyety; And that the owner hath uſed to pay the tenth of his moyety in diſcharge of all, &c. And it was held by the Court to be a good ſurmiſe, For by the Common-Law the Parſon can not have the tithes of fiſhes taken in the Sea, becauſe it is not within any Pariſh; And then when the Parſon, by the cuſtome, ought to have the tithes of them, he ought to take them according to the cuſtome. And that the tenth of the moyety may be a good diſcharge of the whole. And the parties went to iſſue upon the cuſtome in Cornhill.

IN debt, they had ſubmitted and oblig'd themſelves to ſtand to the arbitrament of A. Who awards that the Defendant ſhould pay to the Plaintiff 10 s. before Eaſter, and that if the Defendant did not perform the ſaid arbitrament, that then he ſhould pay 5 l. to the Plaintiff. That the ten ſhillings is not paid, and now the Plaintiff brought an action for the 5 l. And adjudg'd, that debt will lies for that penalty. For the Arbitrator hath power to appoint the aſſurance for the payment of the principal, and of the penalty alſo, being by one entire deed, although that it be by ſeveral clauſes. ve. 9 E. 4. Bro. Arbitram. 29. Although that it was objected, That the thing it ſelfwas debate, and not the performance of the arbitrament was the thing referr'd to arbitrament, ve. 7 H. 6. 40.

Nicholls Caſe.

T. 2 Jac. C. B. IN an Ejectione firm. It was obſerv'd by the Court for an infallible rule, That, that, as may be reduced by a real action, may be reduc'd by an entry, (as in one acre, in the name of more.

William Gilſon *againſt* Wright et alios.

G. Brought an action of treſpaſs for the breaking of his Seat in the Church, and cutting of the timber, in ſmall pieces and carrying them away, &c. The Defendant pleads in Barr, that they were the Church-wardens: and that the Plaintiff had erected that ſeat without the licence of the ordinary, and it was an hindrance to the Pariſhioners, &c. and that they as Church-wardens, the ſaid ſeat, &c. the which is the ſame treſpaſs. The Plaintiff demurrs and Judgement for him. For admitting that the Church-wardens may remove ſeats in the Church, at their pleaſure, yet they cannot cut the timber of the Pue. And thereupon they confeſs the treſpaſs. ve. 6 E. 4. 7. 9 E. 4. 14. 8 E. 4. 6. 18 E. 4. 8. 21 H. 7. 21. 12 H. 7. 27. 11 H. 4. 12.

Dame Powell *againſt* Weeks.

T. 2 Jac. C. B. rot. 1816. IN Dower it was reſolv'd, That a divorce cauſa adulterii is no barr of Dower. Becauſe it is but a menſa et thoro and not a vinculo matrimonii. And it was ſaid by Daniel, that an Elopement is not a bar of Dower ad oſtium Eccleſ. And judgement for the Plaintiff.

Ford

Ford *againſt* Lerke.

AN Ejectione firm. was brought of a houſe, barn, et de coquina (Anglicæ) a Kitchin, And after verdict it was moved in arreſt of Judgment, that the writ is not good; For the demand is uncertain: For any room by uſage may be made a Kitchin, &c. And judgement quærens nil cap. per bill. ve. 5 H. 7. 9. Franktenement in an upper-room. Paſ. 13. Iac. An Ejectione firm. pro cubiculo mainteind. And Mr. Corbet Reader of Furnivals Inn vouch Tri: 2 Iac. B. R. rot. 649, Lerk againſt Ford. That an Ejectione firm. lies pro coquina.

Court *againſt* Blackman.

IN trover and Converſion. The Plaintiff declares that he was poſſeſt of the ſaid Gelding, and loſt it caſually, and that after it came to the hands of the Defendant at T. in the County of Warwick; and that he knowing, &c. converted it to his own uſe. The Defendant ſaid, that long time before &c. the Archbiſhop of Canterbury, &c. was ſeiz'd of the Mannor of Harrow upon the hill, in the County of Middleſex, where he, &c. had waifs and ſtreys; and conveys that Mannor to the Lord North, and that the ſaid Gelding was waif'd there; and he as Bayliff ſeiz'd it, Abſque hoc, that he is guilty in the County of Warwick, &c. The Plaintiff upon that demurs, becauſe the traverſe is to the place. But by all the Juſtices, the traverſe is well; becauſe it was a local juſtification: and it is not lawful to bring an action in a Foreign County. And in that was vouch't 43 Eliz. 506. Purrells caſe. 34 H. 6. 5. 9 H. 6. 63. 9 E 4. 45. 22 E. 4, 39. 1 H. 7. 6. A traverſe well taken to the place, &c. *Intr. Tri. 2 Jac. C. B. rot. 1320.*

Sherret *againſt* Mallet.

IN debt upon an Obligation Noverint univerſi, &c. teneri, &c. in 40 libris, &c. for libris, and that was held an ill and inſufficient obligation. For liba is a word that ſignifies a cake, and the bath does not help it. And one Penroſes caſe was vouch't, who was an Atturney of the Court, and makes an obligation of 200 litris for libris; And it was adjudg'd an ill obligation. And he was committed to the Fleet for his knavery. *Intr. H. 3. Jac. C. B. rot. 909.*

NOte, if tenant of the [illegible] capite, makes a gift in tayl, & the Donee dies, his iſſue within age, N. B. 14 3. b. the King ſhall have Ward. Otherwiſe of a tenure in Chivalry only. And that difference was held by Frowicke in his reading; the which was inroll'd in the Court of Wards by the Kings Command. And the Law there rul'd accordingly, which reconcil'd the books, ve. Dyer 54. b.

Warner *againſt* Agus.

LEſſee for years grants all his Intereſt to the Leſſor by indenture, rendring rent durante termino. And adjudg'd, that that is a good reſervation, and that the leſſee may diſtrain for it, and durante termino, ſhall be conſtrued for all the years. And Littleton, A rent reſerv'd to an Eſtranger. That in truth is not a rent, yet it is a good reſervation. *M. 2. Iac. C. B. rot. 2760.*

NOte, Faux judgement brought upon a recovery in antient demean by the Anceſtor of the Defendant. and he prayd his age, and had it; Becauſe he was now a terretenant, By the Court: But otherwiſe if he had been nam'd for conformity only. ve 9 H. 6. 47. 47 E. 3. 37.

The Governours of Bridewell.

They brought a Quare impedit by that name. And in that a case was vouched to be in 41 Eliz. B. R. Lodars case. An indictment alleg'd de facto to be at D. in the County of Oxford, and that the party went from thence to W. in the County of Buckingham, &c. and concludes; and so apud D. in the County aforesaid, &c. that is ill, because uncertain at which County: But otherwise it had been, if it had been, and so apud D. prædict. in Com. prædict. that had been good enough.

Harris *against* Stephens.

A Man makes a Feoffment in Fee to the use of himself for life, the remainder over to B. in Fee, with a power to make leases for three lives &c. rendring the antient rent, &c. and does accordingly, and dies. Quære, if B. in the remainder shall have rent. And the better opinion was that he should. But 'twas not adjudged.

Bridges *against* Raymond.

In debt upon an obligation to pay a lesser summe. The Defendant pleads tender at the day and place, &c. And the Plaintiff takes issue upon the tender, &c. which is found against him. And now he prayes to have the money out of the Court. But it was denyed. For he hath lost that advantage by taking issue upon the tender. And that he was too covetous, and by seeking to gain all, he hath lost all, ve. 21 E. 4. 45.

Eden *against* Blake.

In Covenant. The case was thus. Lessee for years covenants to repair the houses, during the term. And in a Covenant brought for not repairing, from such a time until such a time. The Defendant pleads, there was an agreement between them, that the Plaintiff should retain 5 l. which he ow'd to the Plaintiff in full satisfaction of the said decay and want of reparations. The Plaintiff demurs, because an accord by parol is pleaded in discharge of a matter in deed which is of a more high nature, as 10 H. 4. But by the Court adjudg'd [illegible]. Because it is for a thing Executorie, and is only a barre pro tempore, and not for a perpetual barre of the said Covenant, ve. 47. E. 2. 24. and Dyer 338. 5 Jac. B. R. Executor of Lessee for life in a writ of Covenant brought against him to remove the utensils before a certain day. And he pleads that accord, and it was ill, because he had not pursued the agreement in removing them; And that was Stamford and Luttleys case.

Banks against Browne.

In an Ejectione firm. he sues upon a demise of a Coppyhold by Indenture by Sir Francis Knowls. This point was resolv'd, That if the Lord of a Coppyholder for life demisable by ten shil. rent, leases it by Indenture to the Coppyholder, and two other for their lives, rendring ten shil. rent; By which it is with 32 H. 8. Read the Statute. And it is not material, although the Herriot be lost, because it is meerly casual, ve. 5. Rep. 4.

The

The King *againſt* the Biſhop of Wincheſter, and Dr. Hide.

IN a quare impedit, after evidence given, and the Jury departed from the bar. And it was mov'd that one of the Jury might be drawn. And it was denied by the Court, becauſe the King ſhall not be prejudiced, becauſe the Judgement is ſalvo jure. But otherwiſe it is uſed in the Exchequer upon an information or intruſion.

Stacey *againſt* Win. Slane, and Tho. Slane.

IN debt againſt 2. They plead nihil debent, and upon that they wage their law, and a day given, &c. at which day one of the Defendants came, and the other makes default, and he that appeared prayd to be to his law, and it was denyed, for the Declaration, and their plea, and the wager of law were all joynt, and the default of one now is the default of both.

Bridges *againſt* Cage.

A Sheriff brought an action upon the caſe for 60 l. upon an aſſumpſit, for extending of land upon an Elegit; and Judgement quod nihil capiat per breve. by the Statute 32 H. 6. which avoids that. And in that caſe by Juſt. Walmſly, That if a Sheriff execute an extent he ſhall have his fees, according to that when it ſhall be levyed, and not according to the debt, or duty recovered. But other Sheriff ſues an execution who takes the body of the party. and that 35 El. C. B. By the Court that if one Sheriff extend land, and before the delivery to the recoverer, he is removed, and the ſucceeding Sheriff delivers it, The laſt Sheriff ſhall have the Fees, lege verba Stat. 29 Eliz. cap. 4. *Int. H. Jac. C. B. 1836.*

Fletcher *againſt* Muſſett.

IN a writ of Covenant the Defendant pleads performance, and that he was marryed according to the Covenant, within 10 days after the date of the Indenture. And the Plaintiff ſaid that he was not marryed to his ſaid wife, within the 10 days. and upon that they are at iſſue, which is found for the Plaintiff. And it was now mov'd in arreſt of Judgement, That that ought to be tryed by certificate of the Ordinary, and not by the Country: and adjudg'd that the iſſue is well tryed, for the time of the marriage is made part of the iſſue, and that was all tryable by the Country. vet 49 E. 3. 12 H. 4. 9 H. 6. 33. 9 H. 7. 2. And the Common Law ſhall be preferred. 38 Aſſ. 29. Dyer. 313.

Roe *againſt* Mathewſon.

R. had recovered in debt againſt A. For which M. was bapl, &c. And in a ſcire fac. againſt him, M. ſaid that the Record, &c. cum omnibus id tangentibus is remov'd by error; and the Plaintiff demurred, And adjudg'd for him, becauſe it is an ill Plea: For the Recognizance remains in Court, and is not removed; By which the Court might well proceed. ve. Dy. 32. and 284. and 6 E. 4. 9. By Piggot and Andrews. For a ſcire fac. is not ſo grounded, as a judicial writ upon the Record, which is remov'd. But upon the Recognizance, which is ſtill in Court, and is not as a Dependant upon the other. ve. 7 H. 6. 44.

Gamford *against* Nightingale.

Intr. T. 2. Iac. C. B. rot. 1402.

IN an action upon the case the Plaintiff declares, that he was seised in fee of Bl. acre, and that he had a way to it by such and such a gate, &c. and that the Defendant had fastened the gate with a lock. And upon not guilty it is found for the Plaintiff. And now moved in arrest of Judgement. And adjudged that that action of the case is well brought, and that he is not put to an Ass.

1. Because it does not appear if the Defendant claims a Franktenement in the land, by which, &c. for it may be an Estrangers, and then an Assize does not lie against him.

2. That is not but a disturbance of a way pro tempore, of which a man cannot have an Assize; as where the party meddles with the Franktenement. As in digging or making of a ditch. vc. for that 2 H. 4. 11. 14 H. 8. 31. Dyer 319. b.

Osburne *against* Bradshawe.

IN debt by an Assignee by Commission of Bankrupts. The Defendant pleads nihil debet, and wages his law. And by the Court he may well, although the interest and power to sue in his own name be good to the Plaintiff by the Statute of Bankrupts. But otherwise if the duty it self had been originally due by the Statute. vc. 19 H. 7. 12.

Fitzwilliams *against* Fitzwilliams.

REceived upon evidence, in an action upon the 5 H. 8. of forcible entry, That if A. had made a lease for years of Bl. acre, and another lease for years of Wh. acre; And he devises all his goods, plate, and jewels (except the lease of Bl. acre) to I. S. That the Lease of Wh. acre passe by such a devise, because the intent appears by the exception.

Gomersal *against* Woodward.

Intr. rot. 2912.

G. brought an action of debt of 24 l. against W. who after Oyer of the condition pleads, That it was seal'd by him and one William Chute, and that after the enseating, that the seal of William Chute was worn off, and after reseated, Per quod scriptum illud vacuum in lege existit. The Plaintiff replies that the said William Chute never seal'd, &c. Upon which the Defendant demurs. But Judgement for the Plaintiff. 3 H. 7. 5. Note by the Court: It is better to plead the special matter than to plead non est factum.

Barnes *against* the Lord Mordant.

NOte, in debt by an Administrator. He declares of the administration committed to him at London by the Bishop of Exeter, and yet it is well, for the power of a Bishop is not so local as the authority of a Justice of peace.

Corners Case.

BY the Court, Upon evidence of the case by Cook ch. Just. by the request of the Lord Treasurer, agreed that an Attorney of that Court

Court cannot be compelled to be a Constable in his Country, for the Court shall discharge him, because he is an Officer of the Court; but it is not so in the Kings Bench, and otherwise of a Sollicitor. ve. 1 H. 12.

NOte, an attachment was awarded against the Coroners of York, because A. was 50 exactus, but they would not give Judgement of the Outlawry, and an affidavit of that made. And by Mellington an ancient Atturney, That the Coroners of Stafford for such an offence were fined every one 10 l: But after the Judgement of the Outlawry pronounced they may stay the return of the exigent for to be advised, if the case requires.

David Meller *against* Sherfeild.

IN debt against an Executor, he pleads that his Testator was obliged to B. in a recognisance of 300 l. ultra quod he had not to satisfie. The Plaintiff demurs, and Judgement for the Plaintiff, because the Defendant had not avert'd, that it was pro vero et justo debitor. Upon which issue might have been taken, and the Executor well knowing upon what defeasance that was made. And by Cook ch. Just. it was rul'd accordingly.

Goldwell *against* Navenden.

IN a Replevin the case was thus. B. held 50 acres of A. as of his Manor of Swarden by fealty, and 4 s. 7 d. rent, &c. And C. held 47 acres of A. &c. by fealty, and 3 s. 4 d. rent. A. by Indenture between him the said B. and C. reciting the said several tenures, gives, grants, &c. and confirms the said rents, services, and seniories to B. and C. and their heirs, to the use of them and their heirs, &c. And in that case it was resolv'd. That is an extinguishment of a moyety of every of their tenures: And for the other moyety they hold one of another. And the Avowant had Judgement accordingly, for there was a crosse tenure between them for the one moyety, and that shall not move as a release, reddendo singula singulis, &c. Dyer 319. See and Note. 11 H. 7. 11 a. 39 H. 6. 2. 49 E. 3. 40. A Recovery against one Joyntenant does not extinguish all the seniory, but the annual entry is gone 27 E. 3. 88. Pla. 47. In the principal case there is not an equal benefit to every of them: For it was said, that if the acres and rents had been equal, that then it should have been extinguish'd in all. Cook put this Report case. A. Lessee for life, the remainder to B. for life. The Lessor gives, grants and confirms to them and their heirs. A. shall have all the possession during his life, and afterwards B. shall have all the possession during his life, and one moyety then executed, and after the death of B. the other moyety to A. in Fee.

Strake *against* Throgmorton.

THe parties were at issue, the Plaintiff sued a venire fac. and before the return of that, the Defendant sues another venire fac. by proviso, which was ill. For no default in the Plaintiff then. The venire fac. of the Plaintiff was not return'd. And now it was held M. 4. Iac. B. R.

First, That if the Defendant had lawfully sued a venire fac. by Proviso, that yet he could not sue a nisi prius upon that untill the Plaintiff had made another default and laches in him; That in our Case, (that happening

ning) The Defendant, by the opinion of the Court, may sue a new venire fac. by Proviso reciting in that, that the first erronice emanavit, And so it was order'd P. 4 Iac. B.R.

NOte by Williams, That it was adjudg'd that perjury upon interrogatories upon a Suite in the Court of Requests, That concern a Frank-tenement is punishable. Because that concerning Frank-tenement was coram non judice 14 E. 4. 2 Br. bre. 487.

Shorts Case.

THou hast stollen my Timber, Are words actionable. For they shall not be intended of trees growing. By the whole Court, For they are then Timber-trees.

Garrons *against* Banbury.

IN trespass for taking of a Spare. The Defendant justifies that the Lord Scanhop was general Post-master of England. And that he made a Commission to A. and B. Constables of Torrington in Devonshire for to take 4 Pegasos (Anglice) Post-horses, virtute cujus they make a warrant to the Defendant to take, &c. by force of which he took the said Spare, &c.

First, It is a good bar notwithstanding that Pegasus be a Ports Action: For it is made good by the (Anglice.)

Secondly, Notwithstanding that the Defendant hath not shew'd the place where the Commission or Warrant was made: For if the Plaintiff had denied it in his replication, the Defendant might well have shew'd it in his rejoynder. vc. 21 H. 7. 23. 2.

Thirdly, Notwithstanding that the Defendant had not shew'd, that the said Spare was imploy'd in the said service. And if he be not imploy'd, The owner hath his remedy by action against the party for mis-using of his Beast. And Judgement, quod querens nihil cap. &c.

NOte, It was mov'd in discharge of a rescous. The return was That they, (viz.) A. and B. aforesaid, the Bayles ad tunc et ibidem vulneraverunt, &c. and the aforesaid George Ball rescusserunt, without tunc et ib. And upon that the parties were discharg'd. For the first ad tunc, &c. referr'd only to the vulneraverunt and not to rescusserunt. And the return judg'd insufficient.

Bradley *against* Benney.

ERrour upon a recovery in an assumpsit in Bristol Court. There the Plaintiff had counted that the Defendant was a common Carrier by boat from Bristoll to Glocester, and that he had deliver'd two Buts of Muskadell, to the Defendant, who assum'd to transport it, pro quadam pecuniæ summa. The Defendant his assumption aforesaid not caring, &c. The aforesaid Buts so long and carelesly kept, that one of them ran out. And the Defendant pleads not guilty, and the issue found against him. And now upon Errour, by the Court, the issue was erroneous; For it ought to have been non assumpsit. For the Plaintiff replyed upon that chiefly.

Basford

Bafford *againſt* Ventres.

IN a replevin. The Defendant pleads that it is his Franktenement. The Plaintiff replyes, that the beaſts eſcap'd thance by default of the enclosure, &c. The Defendant replies that tempore captionis the hedge was well repaired. And iſſue upon that is found againſt the Plaintiff, who now moves in arreſt of Judgement, That it is not a good iſſue. For it ought to have been tempore Eſcapii, or intrationis. But by the Court, that was now diſallow'd, being mov'd after a verdict. But becauſe, upon view of the return of the venire fac. nothing was indorſed, but the Jurors names, the Court awarded a repleader. 5 Rep. 41

A repleader after verdict.

Hudſon *againſt* Crane.

UPon Evidence in battery, Poph. Fenner, and Williams, directed the Jury, That if A. aſſaults B. and in fighting A. falls to the ground, and thereupon B. beats and wounds him, That that is an aſſault in B. not juſtifiable. And ſo if another had held A. in his arms, and then B. ſtrikes him, That aſſault is a battery in B. not juſtifiable, &c. and the Jury found accordingly. But Yelverton and Tanfield on the contrary, Becauſe it is but a continuance of the former aſſault. And that all is de ſon aſſault dem.

Wood *againſt* Smith.

IN Trover many exceptions were taken.

1. Becauſe the Plaintiff has counted that the teſtator had divers goods, without ſaying notabilis, in Divers Dioceſſes, by which the Metropolitan has committed the Adminiſtration to him, &c. and the Court held that count to be good enough. For if the Defendant denied it, the Plaintiff might give that in evidence.

2. He has counted, that the Inteſtate was poſſeſt of divers goods, and of one Gelding, and of one Mare, of the price of 50 s. without any price of the Gelding. And yet by the Court good enough, ve. 44 E. 3. 20 a. Rep. 34. 7 E. 4. 25.

NOte by the Court, That a Creditor cannot, by the cuſtom of London of attaching, attach a legacy that is to be paid to the party; Becauſe it is a ſpiritual duty.

2. That the Mayor of London being Chancellour there for petty matters, may examine and other matters after verdict. But Tanfield, No more than after judgement: For it is not reaſon, that after the party hath been at charges of a trial, that he ſhould loſe his advantage by the Order of the Mayor, ve. 10 H. 6. 14.

Covil *againſt* Barton.

UPon Evidence in an action upon 27 Eliz. For avoiding of fraudulent Conveyances. The Defendant in his examination in Chancery has depoſed that he thought that it had been a good and ſimple deed, and upon good conſideration, and it was reſolved by the Court,

1. That a Purchaſor after ſuch an Avoiding ſhall not have an action.

2. That that (thought) or (believing) is not a direct affirmation.

3. That

3. That it is not a voluntary Avowing; but the party is compelled to it, by ſub pœna, and ſo not within that Statute.

4 That he that had the future intereſt for years, might have an action upon that Statute, as he in the remainder might have an action for forging of deeds, &c. 15 E. 4. 33 H. 6.

Peſcod *againſt* Marſam.

P. brought an action upon the caſe, becauſe M. had maliciouſly cauſed him to be indicted for ſtealing of a Plank, that uſque acquietatus fuit. And by the Court, It is good without ſaying, legitimo modo acquietatus, in an action upon the caſe, which lies as well before as after the acquital, for the infamie by the Indictment. And that ſo it was adjudg'd 29 Eliz. B. R. Knight againſt Ierome. But otherwiſe it is in Conſpiracy; as it was adjudg'd M. 40. 41 Eliz. Gooch againſt Bricket: For there he ought to ſay, legitimo modo, &c. ve. N. B. 116. 115.

Sidner *againſt* Calver.

NOte by Tanf. that by the Stat. 13 Eliz. cap. 20. of Non-reſidency. That if the Parſon be abſent 80 dayes in a year, although it be at ſeveral times (viz.) 10 dayes at one time, and 20 dayes at another time, until 80 dayes, &c. That is within the Statute, by which it hath been adjudg'd.

Wittams Caſe.

IN an action upon the caſe for words, (viz.) If ever man was perjured, Wittam was. And iſſue upon not guilty, it is found for the Plaintiff; and it was moved in arreſt of Judgement, becauſe that the plaintiff hath not averr'd that any man was perjured. And by Tanfield only in Court, That judgement ſhall be ſtayed. For by him it hath been adjudged, That for words Thou art as very a thief as any in Glouceſter Gaol, is not actionable, without averment that there was a thief in Glouceſter Gaol. And the reaſon is, becauſe theft and perjury are ſuch bad things in themſelves, that they ſhall not be intended without an averment, &c.

Vaughans Caſe.

HE brought a writ de droit cloſe in the inferiour Court in nature of an Aſsize, &c. for 50 acres againſt 5 Defendants, two of the Defendants are found guilty of 3 acres, and the other are quit; yet the verdict was entred againſt them two, as guilty of all the 50 acres, and execution upon that accordingly. And after the five Defendants ſuyn in falſe Judgement in the Common Bench, and aver the matter aforeſaid, according to 1 E. 3. cap. 1. and there adjudged, that it was errour. And now in errour in the Kings bench it is now adjudged errour.

1 Becauſe all the five Defendants ſuyn in falſe Judgement, where it ought to be brought by the two only, &c.

2 By Popham and the reſt, that ſuch an averment is not receivable. Read the words of the Statute, G. B. 30 L.

Note

NOte in the argument of Boſwells caſe, 6 Rep. Crooke cited 14 E. 3. ſcire fac. 122. Where judgement in an annuity was revers'd as to the annuity and damages, and good for the arrerages; and alſo vouch't 38 Eliz. in the Exchequer, Agar againſt Candiſh, who was found guilty in an information, tam pro Rege quam pro ſeipſo, Upon the Statute of Liberties. He brought Errour, and aſsign'd for Errour that the Statute 8 E. 4. cap. 2. gives the examination of that offence to the Kings bench, and the Common bench But becauſe the King may chuſe his Court to ſue where he will for his moyety, &c. judic. as to the moyety of the King. And the information for that good. But as to the moyety of the party, reverſetur. *where a judgement ſhall be revers'd in part.*

Molineux's Caſe.

THe caſe, as by the Arguments of it in Tr. 4. M. 4. et H. 4. Iac. B. R. was thus A man makes a grant of ſeveral rent-charges by ſeveral deeds for the youngeſt Sons; and never executes it by Livery, &c. And afterwards by his will deviſes that his younger Children ſhall have the Inheritances according to the ſeveral writings. And reſolv'd that although that the writings and deeds were not parcel or part of the will, but another matter, Yet that reference being to the matter in deed, is a good deviſe of the rent-charge, within the 32 H. 6. Of Wills.

Grimſtone *againſt* Stones.

IN an information for not repairing to the Church, &c. upon 23 Eliz. cap. 1. It was reſolv'd, That if the party be convicted upon an Information, there the Informer ſhall have the penalty according to that Statute. But if the party, before the information, be convicted of it upon an Indictment at the ſute of the King, there the King ſhall have all the penalty to himſelf, by 28 Eliz. cap. 6. And the Informer and the poor ſhall have nothing. And the Defendant in our caſe pleaded, That he was indicted at the Aſsizes &c. before A and B. Juſtices &c. and it was held a good barr, and that ſo it was adjudg'd in the Exchequer, and in the Kings bench accordingly. *Latch. P. 3. Jac. B. R. fol. 112.*

Thorne *againſt* Alice Durham.

D had ſued T. in the Spiritual Court for this, That whereas he was of good fame, & kept a victualing houſe in good order; That the ſaid T. had publiſh'd that D. kept an houſe of Bawdry. T. now brought a prohibition, and by the Court well. For D. might have had an action for that at the Common law; Eſpecially where he kept a victualling houſe as her trade. Note 27 H. 8. 14. And by the Juſtices, that the keeping of a Brothel-houſe houſe is inquirable in the Leet. And ſo a temporal offence. And ſo was the opinion of the Court. T. 7 Car. B. R. Mrs. Hollands caſe.

Taylor *againſt* Perkins.

AN action upon the caſe was brought for words, Thou art not worthy to come into my mans Company. Thou art a leprous knave and a leper. Adjudg'd that it is actionable. For a Leper ſhall be ſecluded, &c. N. B. 134. Br. fo. 12. a.

Chalchman *against* Wright.

IN an information upon 23 H. 8. cap. for selling of beer, (vizt.) 100 barrels, contrary to the price set down by the Justices. The Defendant pleads that there is a former information hanging against him in the Exchequer, For the said offence. And adjudg'd a good barr, If it be bonâ fide; and if it be not bonâ fide, the Plaintiff may avert the fraud, &c.

2. That that Statute extends to the Successors of the King; although that they be not there expressed.

3. That in reciting the said Statute the Plaintiff hath counted for a Foris faciat dicto domino Regi. Where (dicto) is not in the Statute. And for that, as it is now pleaded, that shall restreyn the penalty only to H. 8. Who is only named in the act.

4. That the orders of the Justices of the Peace for the price, &c. ought to be publickly proclaim'd and made known to the Country, Otherwise the Brewers cannot take notice of it.

Austin *against* Moyle.

A. Leases by Deed to M. for ten years, and M. covenants at the end of the term, to leave four acres of the land fallow'd and Plow'd. And in that there was also a proviso that if M. mislike his bargain, that upon a years warning he may surrender his Estate. And after M. surrenders accordingly, But had not left any fallow'd. And adjudg'd by the Court, that that acceptance of the surrender hath not dispenc'd with the Covenant. Otherwise it had been if the proviso had been in the end of the 10 years; For then if the Lessor accepts the surrender before the ten years expires, it is impossible for the Lessee to perform the covenant. Judgement that the Plaintiff should recover.

Raymond *against* Harard.

H. 4 Jac. B. R.

ERrour, upon Judgement, in the Court of Linne, in debt, for five pound upon an insimul computav. And issue was joind upon nil. debet. The Jury found quod insimul computav. and that H. was found in arrear of five pound. Sed ultra com. prædict. &c. And upon that Judgement was given for the Plaintiff. And now it was reverf'd for this errour. For the Jury hath not found any thing of the debet, which was their issue. But if they had found a debet, &c. Then the circumstance after shall not impair that. As Dyer 372. a.

Hill *against* Prowse.

IN an Ejectione firm. a special verdict was found; That A. was seis'd, &c. and being so seis'd the first of May, &c. fecit, sigillavit, et scriptum suum tradidit et deliberavit, an Indenture purporting a Lease for Life, Which follows, &c. This Indenture made, &c. By force of which the lessee entred, &c. And by the Courrt, that is no good finding of a Lease for life. Because they have not found livery and seisin; nor an expresse demise for life. But after upon search of the notes of the special verdict, it appears livery and seisin was found; But the Clerk of Assize had omitted that in the entring of the postea. Resolv'd by the Court that the

Clerk

Clark ſhould amend the poſtea, and then the Record ſhould be amended accordingly. ve. 4. rep. 52.

Parrey *againſt* Dale.

AN Obligation was made of 50 l. for 50 l. &c. And adjudg'd quod querens nil cap. per bill. For it is not a Latine word, and it differs from 9 H. 6. 7. 2, Wigint libr. which is good enough, for V. and W. are all one, and differs in the pronunciation only in Engliſh. But M. and N. are ſeveral and diſtinct Letters. Note 2 H. 4. 8. Nundare for Mundare; The Writ ſhall abate. And 14 Aſsize 1. tenenent pro tenement. The writ abates, &c.

Heigate *againſt* Williams.

IN an action of treſpaſſe, the caſe was thus. A. had a croſſe way by preſcription to go to Wh. acre over Bl. acre, and after he purchaſes Bl. acre, and of that enfeoffs I. S. And adjudg'd that the croſſe way is extinct. Because by the unity the preſcription fails. 21 E. 3. 2, 21 Aſſ. 1. Dyer. 295 b. 11 H. 4. 5. 11. *Intr. M. 3. Jac. B. C.*

Fawcets Caſe.

IF a man be indicted for a forcible entry upon 8 H. 6. and before reſtitution, the force is pardoned by Statute or general pardon. That now there ſhall not be any reſtitution upon that indictment; for the firſt force and offence is pardoned. But if the party had brought his action for forcible entry, &c. ſuch a pardon ſhall not reach the reſtitution. And by the Court that ſo it hath been adjudg'd. The Lord Stafford *againſt* Sir John Thinne.

Bagſhaw *againſt* Gawin.

B. brought an action of treſpaſſe (quare vi et armis) for his horſe preii 5 l. after the 14 of October. The Defendant juſtifies as bayly, &c. for an Eſtray, and that he delivered it to the Plaintiff the 16 of Octob. And the Plaintiff replyes, that the Defendant himſelf the ſaid 16 day of Oct. before the redelivery had us'd and wrought the ſaid horſe. The Defendant demurrs. And it was reſolv'd by the Court,

1. That although that it be a general writ of Treſpaſſe, yet it is good although that the price of the horſe be put in, the declaration and the damages may be qualified upon the evidence, and yet the Plaintiff may have a ſpecial action.

2. That by his acceptance of his horſe, be it before or hanging the action, the Plt. has not abated his writ.

3. That an Eſtray cannot be wrought no more than a diſtreſſe; For the party hath not any intereſt, but only a cuſtody of it.

4. That by the uſing the 16 of Octob. he was a treſpaſſer ab initio (viz.) the 14 day of Octob.

5. That he that ſeiſes an Eſtray, may detein it till he is ſatisfied for his feeding. 44 E. 3. 14.

6. That one may milk an Eſtray Cow. So by Noy Atturney General. That it was reſolv'd in one Prideaux's caſe, which he bought in Lincolns Inne Hall 23 March 1633. That a man may ſhear a ſtray, but cannot work it. But a Cow taken for a diſtreſſe cannot be milk'd nor wrought, becauſe it is a puniſhment to the owner, and in cuſtodia legis.

Buchgrave *againſt* Heale.

ERrour was aſsign'd, That in debt againſt an Executor, he pleads fully adminiſtred, and afterwards relicta verificatione confeſſes the action; And Judgement that the Plt. ſhall recover the debt and damages, de bonis teſtatoris, If not de bonis propriis, whereas the damages ought to have been de bonis propriis. For it is no reaſon to charge the goods of the Teſtator, with damages for the obſtinacy of the Executor. And 14 H. 8. 12. 32 H. 6. 23. 7 E. 4. 9. And Dyer 185. differs; Becauſe there the Defendant ſtood out the tryal. 6 E. 4. It was ſo adjudg'd in a Judgement upon a nihil dicit againſt an Executor.

Harrington's Caſe.

ERrour aſsign'd upon a Judgement in Shrewsbury Court.

1. Becauſe upon the writ of enquiry of damages no day was given to the Plaintiff.

2. Upon the return of the writ of enquiry, &c. it was entered continuato proceſſu Iurata ponitur, &c. in reſpect that it is a proper continuance for a panuel to try an iſſue, and not upon an Inqueſt of Office, as ſo it is. But that ought to be return'd to be executed, or that the Sheriff hath not ſent the writ, becauſe it is not yet executed. And for theſe errours Judgement revers'd.

NOte, an Indictment upon 8 H. 6. for forcible entry, was quaſh'd, becauſe it was, et in diſſeiſivit without ſaying (inde) And by the Juſtices Sir Iohn Parrats Caſe in the Exchequer. That a pleader that A. was ſeis'd, et ſic ſeiſitus, enfeoffs, &c. That is not good without ſaying, et ſic inde ſeiſitus, &c.

Stone *againſt* Wakemin,

P. 5. Jac. B. R. STone brought an action upon the caſe againſt W. for ſtopping of a way, And iſſue upon not guilty it is found for the Plaintiff, and mov'd in arreſt of Judgement, becauſe in the County the Plaintiff hath preſcribed that the Inhabitants of C. have uſed to have a common croſſe way &c. And that he is an Inhabitant in a Meſſuage in C. And hath not ſhewn that C. is antiqua villa. But by the Court that was diſallowed, and the preſcription held good enough. For he does not claim any Right or Intereſt in the croſſe way, but only an eaſement. vi. 6 rep. 59. Dy. 76. But for an other cauſe by the Court the Plaintiff ſhall not have Judgement, Becauſe he hath not ſhewn how he hath ſuffered any particular damage or loſſe by that ſtopper, &c. vi. 5 Rep. 73. 27 Hen. 8. 27.

Preſton *againſt* Love,

VPon evidence in an Ejectione firmæ by the Court.

1. That if the Leſſee for years after his term expired takes a new leaſe for years of an Eſtranger rendring rent, and pays that; yet he remains tenant at ſufferance, as to the firſt Leſſor.

2. That in ſuch a caſe the Leſſor may leaſe it to another before any entry by him, for it is not out of his poſſeſsion.

Small's

Smalls Case.

By the Court (Poph. being abſent) it is clear; That an agreement betwixt the Parſon and one of the Pariſhioners. That he ſhall have his own tithes for years, is good enough without deed; But otherwiſe if it had been for life. And it is a bitter way to plead that as an agreement and not as a Leaſe.

Sir Henry Cheverells Caſe.

A Quo warranto was brought againſt him, ten. diverſ. libertat. Privil. &c. without putting of any certainty. As waife, ſtray, Frankpledge, &c. To which the Defendant might make a particular anſwer. And by the Court that is nought. But Mr. Water-houſe the prothonotary ſaid, that there are preſidents accordingly. And therefore a day was given to ſearch the preſidents. And in the interim let proceſſe ceaſe againſt the Defendant. N. B. 160. b.

Doctor Atkins *againſt* Doctor Gardener.

Doctor Langton late preſident of the College of Phyſicians had recovered for the King and for himſelf, by the name of Preſident Collegii 60 l. and dies And afterwards Doctor Atkins being nave preſident brought a ſciri fac. upon that judgement. And by the whole Court adjudg'd well. And it ought not to be brought by the Executor of Doctor Langton. ve. Dyer 148. a.

Note, the Sheriff delivers poſſeſſion upon a recovery in an Ejectione firm. by A. againſt B. and in the interim B. ejects A. again. And now A. prays new writ of habere fac. poſſeſs. And by the 4 Juſtices. Becauſe the firſt writ is not yet return'd, ſo that it may appear of Record if it be executed or not, A new writ ſhall be awarded. And the cauſe of the firſt writ ſhall be Quia vice comes non miſit, &c. And by Caufield that Haſtings Caſe was ſo adjudg'd.

Comyn *againſt* Wheatly.

Upon errour it was reſolv'd that an Ejectione firm. lies, of a Colemine. 43. E. 3. 35. An aſſize lies and was brought for a Colemine.

Thimblethorpe Caſe.

Judgement was revers'd by errour. Becauſe no pledges of proſecuting were found in the firſt action to prevent the unjuſt vexation of the party. Dyer 288. N. B. 31. a. 195.

Otecells Caſe.

The Wardſhip of the body and Land of William Roſſe was granted to him during the minority; And under the Seal of the Court of Wards. And O. frames an indictment againſt A. upon 8 H. 6. for a forcible entry in that Land. And held, that it is good, although that the King at the full age of the Ward, ſhall award livery to him of that Land, And yet for that, the King hath not the poſſeſſion of the Land, but a cer-

tain power and intereſt to make livery. And by Fenner, That a leſſee for years of the King hath brought an Ejectione firm. and adjudg'd maintainable, 1 H. 7. 17.

Browne *againſt* Banks.

IN an Ejectione firm. The Defendant pleads, That locus in quo, &c. And by the Court it is a good plea. For a writ of Habere fac. poſſeſſ. out of the Court cannot be executed there. ve. 5. Rep. 105. a. b. Ofantient Demean.

NOte, a writ of Errour was directed, Maiori, Recordatori, et cap. Aldermanno of Eveſham, &c. and the Mayor and the Recorder only return it, and certifie (viz.) Placita ten. coram Maiore et Recordatore (without ſaying) et cap. Aldermanno. And for that, the writ was abated, and the party put to a new writ of Errour, &c. Quod coram vobis reſidet, &c. By the Court.

Raymonds Caſe.

R. was indicted for ſtopping of a croſſe way leading from a certain Village called Stoake, unto a village called Melton in the County of Dor. And by the Court that was quaſh'd, Becauſe, in the County of Dor. refers only to Melton, and not to Stoake. And then it is not known in what County Stoake is. And for that the indictment naught.

Bolls *againſt* Sir Henry Winton.

M. for natural affection to his Son, covenants to ſtand ſeiſed to the uſe of his ſonne for life, and after his death, to ſuch a woman as he ſhould marry, for her life, the remainder to D. in tayl; and before that the Son had married, A. leaſes that land for an hundred years to I. S. The ſonne marries S. and dies, ſhe enters upon I. S. and leaſes to B. who being ouſted, brings an Ejectione firm.

1. That it is a good Conſideration to raiſe an uſe to her that ſhall be the wife of the ſonne, ve. Plo. 154.

2. That a leaſe for years by the Covenanter to I.S. does not hinder the raiſing of the uſe contingent, ve. Dy. 290. But otherwiſe it had been, if the Covenanter by the ſame deed had reſerv'd a power to himſelf to make leaſes for years. But in our caſe the leaſe for 100 years takes effect as a future intereſt out of the Fee; That was in the Covenanter after the Eſtates determined; and at the worſt the Feme ſhall have the reverſion, and rent during her life; and Williams vouch Ralph Egerton's caſe, where it was judged accordingly. And now Judgement for the Plaintiff.

Ward *againſt* Mathew,

A. in conſideration of ſervice and other cauſes gives Bl. acre to B. his ſervant, and C. my Coſin in tayl. And the Jury found an intention of Marriage at that time between B. and C. which was effected. After B. the husband dies, having iſſue D. C takes E. to husband, and they enfeoff D. the iſſue in tayl. E. alſo dies, C. re-enters, D. levies a fine ſur. conuſans de droit, to I. S. and D. after enters upon C. for the Forfeiture by the Statute, 11 H. 7. cap 20. leaſes to W. the Plaintiff, who being ouſted by M. the Defendant, to whom C. the wife had leaſed

leas'd it, brought an Ejectione firm. And it was adjudg'd against the Plaintiff.

1. For first, for a moyety there is no question, for the gift being before the marriage, D. and C. shall take by divided moyeties. And so it was adjudg'd in the Court of Wards. Edmunds Case, upon such a gift by a Father of the son upon an intention of marriage.

2. D. the son hath barr'd himself to take benefit of the forfeiture, by 11 H. 7. cap. 20 for levying of a Fine. And I. S the Conusee shall not take benefit of the forfeiture, for it was a Fine by Estoppel only, and no interest pass'd by that. As it is in the 3 Rep. There he that levyed the Fine had a real remainder in him. But in our case D. had not but a dry right to the estate tayl, after the death of C. his mother. And so note the difference, And by the Court Judgement against the Plaintiff.

Hannock *against* the Executors of Crouth.

LEssee for years covenants to repair and leave it repaired. He dies, And in a Covenant brought against his Executors it was resolv'd by the Court, that release of all actions and demands, does not discharge that Covenant, because in a Covenant damages shall be only recovered, which are not due, nor a sute lawfull for them, before the Covenant broken. And that word demand, as it is referr'd to the action by cause of a subsequent wrong, does not discharge any thing before cause of action for the wrong. ve. Dyer 57. 217. 11 H. 4. 6.

Oldfeilds case.

A. had an acre of land which was in the middle, and incompass'd with other of his lands, and enfeoffs B. of that acre. And resolv'd by the 4 Just. that B. shall have a convenient way over the lands of the Feoffor, and he is not bound to use the same way that the Feoffor uses.

Cook *against* Wall.

IN an Audita querela, it was resolved by the Court, That if a debt be brought upon an obligation, and issue (upon nihil debet) is found for the Plt. Now the Defendant shall not have an Audita querela upon a surmise, that it was an usurious contract. For he might have pleaded that in the action of debt.

NOte, that a prohibition was granted; where the Commissary, at his visitation Court, cited many men of several Parishes to appear before him there, and for not appearing they were excommunicated. And a prohibition was granted, because the Ordinary hath not power to cite any to that Court but the Churchwardens and Sidesmen, and those he may impannel, and give Articles to them, for to enquire as the Justices of Assize. ve. N. Br. 41.

Hunt *against* Feild.

ERrour assign'd upon Judgement given at Worcester. Hunt Summonitus fuit ad respondend. R. F. et unde idem querens per B. his Atturney, &c. And because the Plaint was so short written, so that of it there could not be sense. And if it were taken for the Plt. that is not good, for idem may have relation to H. as well as to R. F. But otherwise if it had been et unde idem R. F. quer. for it must of necessity have been

in-

intended of the Plaintiff Querens, and for that fault Judgement was revers'd,

Jennings Case.

IT was resolved upon a special verdict for the avoiding of a Lease for non residency within 13 Eliz. cap. 20. But that Statute was not found by the Jury, nor pleaded by the party. For if that Statute be general, then the Judges shall take notice of it ex officio, and it need not be pleaded.

Rockwoods Case.

THe Sheriff sues a scire fac. and inquisition to make execution of the goods of I. S The Enquest found that the goods now in question, were the goods of I. S. who in truth appertained to R. And by the Court, the action of trespasse is well brought. For that inquisition is not an absolute discharge for the Sheriff, but only matter of Evidence, for to excuse or mitigate the offence. ve N. B. 35. 5 Rep. 32.

Bayly *against* Child.

AN Infant by his Guardian brought an action for words, I charge thee with felony, And the issue upon not guilty is found for the Plaintiff. And now mov'd in arrest of Judgement, because it is not averr'd that the Plaintiff was of such an age that he might commit felony. But by the Court that was disallowed, and if in truth he be not of such an age, that ought to be pleaded by the Defendant, and not averr'd by the Plaintiff for avoiding his own action, and Judgement for the Plaintiff.

Reedhead *against* Harper,

AN action upon the case was brought in nature of a disceit. That the Defendant had sold to the Plaintiff certain sheep, and had warranted them to be sound, when in truth they were rotten. The Defendant pleads that they were sound at the time of the sale, Et de hoc ponit se super patriam. The Plaintiff demurrs, and it was adjudg'd for him, because the Defendant had taken traverse to the cause of action, (viz.) absque hoc that they were rotten. And issue shall not be taken upon two affirmatives. 4 H. 7. 13. a. 1 H. 7. 9. b. c.

Wats et Lee *against* Ognell.

IN debt for rent arrear. It was resolved that the fine was lebied to A. and B. to the use of A. B. and C. that they are all jointenants, although A. and B. was in by the fine at Common Law. And by 27 H. 8. of uses. And that in 21 Eliz. it was adjudg'd accordingly upon a feoffment. ve. Dyer, 200.

Stanred *against* Laycock.

IN an Assumsit the Plaintiff declares that the Defendant promised to convey Bl. acre (being Copyhold land) to the Plaintiff by such assurance as shall be devised. And that B. had devised it to be made by letter of Attorney to C. to make a surrender in the name of the Defendant, &c. to the use of the Plaintiff. And obliges for the quiet enjoying

joying, &c. And that he had tender'd the letter of Atturney, &c. to the Defendant: and that he had refus'd to ſeal it. And the iſſue upon non aſſumpſit is found for the Plaintiff. And now mov'd in arreſt of Judgement, that the Defendant had not ſhew'd if the Obligation was ſealed or not, and that perhaps the Jury had given greater damages in regard of that. Yet by the Court it was adjudg'd for the Plaintiff. For the Obligation is not part of the aſſurance; and that it is out of the reference to B. and the not ſealing it, is not accomptible. And therefore it ſhall not be intended that greater damages were in regard of that.

Nicholas *againſt* Loddington.

IN a replevin, It was held by Fenner and Yelverton, That the pleader of an Atturnment (viz.) that the tenant of the Francktenement attourn'd is not good, without naming him. For perhaps the tenant of the Francktenement ought not to attourn, as aſsignee of the tenant in Dower, 11 H. 4. 19. Crook accordingly. And if iſſue be joyn'd upon another point collateral, then ſuch a pleader is well done, and Judgement ſtaid.

Sir James Skidnes *againſt* Huſon.

IF an Eſtranger enters my cloſe, and cuts my trees, and carries them away. That I may have trover, although, that after the cutting, and before the carrying away, I could not claim them, and no actual poſſeſsion in me.

Watt's Caſe.

AN Indictment upon 8 H. 6. wanted (illicite) And it was rul'd to be good. For diſſeiſivit implies as much. See a preſident in Lamberts Juſtice of peace, 155.

Winkſworth *againſt* May.

AN action of treſpas, for a treſpas in Wh. acre, the Buttals expreſſ. And upon not guilty, the Jury found the Defendant guilty, quoad medietatem acræ prædictæ, without any certainty of which moity. And yet reſolv'd, that the verdict is good in treſpas, Becauſe damages only ſhall be recover'd. But otherwiſe it is in an Ejectione firm: Becauſe there, there ought to be a certainty, to make the execution of it. And judgement for the Plaintiff, 1 H 7 9. a. So in the Property of a Pannor, ve. 1 E. 5. In the caſe of a detinue.

Andrews *againſt* the Hundred of Lewkner.

IN an action upon the Statute of Hue and cry, upon a robbery. The Plaintiff concludes contra form. Statuti, and reſolv'd that it is good, and that ſhall referre to the Statute 13 E. 3. And that 27 Eliz. is but reſtrictive, and for the better direction in ſuch caſes.

IN Debt againſt Baron and Feme as Executrix, &c. they plead payment by the Teſtator, and upon iſſue it is found againſt them, and judgement quod recuperet debitum, de bonis Teſtatoris, and the coſts and damages, &c. And if not, then the coſts and damages, de bonis propriis.

And in Errour it was held to be a good judgement; although a Feme Covert cannot have goods in her own right; Yet ſhe may have them as executrix. And ſo Judgement affirm'd.

Note by Yelverton and Williams, nullo negante, upon the motion of Mr. Clark, That if A. be leſſee for life, the remainder to B. in taple, and a precipe is brought againſt B. If he happens to have a ſurrender of the Leſſee for life at any time before the recovery. That then it ſhall be a good recovery, and the precipe is now made good. That was in the Caſe of a Common-recovery. And yet to many intents the Judgement ſhall relate to the firſt day of the term. But a fiction does not deſtroy a lawfull thing. 5. H. 5. 9. A. brought a precipe againſt B. for Bl. acre, B. purchaſes Bl. acre. Now B. cannot plead non-tenure. Otherwiſe if Bl. acre had deſcended to B. hanging the action. 35. H. 6. 4. 41 E. 3. 5. a. b.

Culcoe *againſt* Sharp.

A Leaſe was made with a condition to re-enter for not repayring, &c. the Leſſor, &c. with the conſent of the Leſſee builds a new Barn upon part of the Land; And the Leſſee takes a new Leaſe of the ſaid Barn. And reſolved by the Court, in an ejectione firm. That by the new Leaſe, the Condition is ſuſpended. For it cannot be apportioned, and the new Leaſe is incurred for that part.

Gellye *againſt* Clark.

A Man comes to an Inne, and lodges there that night; and in the morning he departs, and ſayes to his hoſteſs: that he will return within two daies, and that he would leave his hamper there, in which were many hatts; And his Hoſt promiſed that they ſhould be ſafe. He returns accordingly; But in the interim the hatts were ſtollen, and judgement quod querens nil cap. per bil. Becauſe he was not a gueſt at the time of the ſtealing: and the Hoſt had not any benefit or profit by the goods being there. But otherwiſe it had been of an Horſe. For then the Hoſt hath a benefit for the Food.

Brownlowe *againſt* the Executor of Ellin Littleton.

L. had recoverered in Dower againſt B. and damages from the death of her Husband. B brings errour, and aſsigns errour, &c. hanging which, L. dies, It was reſolved upon ſearch of preſidents, that a ſc. fac. ſhall not iſſue againſt the Executor for the damages. And there need not a new writ of errour. For that errour does not abate by the death of the Defendant in the errour; as our Caſe is. Otherwiſe if the Plaintiff had died. And as to the Land there needs not new errrour, Becauſe by the death of L. the Land belongs to B. So in P. 39. El. B. R. Williams againſt Williams. In errour brought upon a Judgement in Dower, with the damages. The Defendant in the writ of errour dies. The Plaintiff brought a new writ of errour ad coram vobis reſidet, againſt the Executor, Who brings a ſciri fac. for to have execution of the damages. And the party pleads, that there is errour hanging for the damages. And by the Court, If the Plaintiff in the errour, had aſsign'd errour according to the courſe of the Court, Then the plea is good, But otherwiſe if he hath not aſsign'd errours. For the ſciri fac. for the damages, is, for to haſten him to proceed cum effectu in the errour.

Maun-

Maunſel *againſt* Orian.

A Habeas corpus was awarded to remove them, being impriſon'd for not taking the oath ex officio, before the High Commiſsioners for Conventicles by the Statute, 1 Eliz. 5. By Juſtice Popb. That it hath been adjudg'd, That a Fine impoſed by the High Commiſsioners was Eſtreated into the Exchequer. And that was levied by proceſs out of the Exchequer, and well. And if they may impoſe a Fine, they may impriſon; and that it hath been ſo us'd theſe 50 years, without any repugnancy, if the offence be Eccleſiaſtical, and belong to them.

Fullers caſe.

F. was of Counſel in an habeas corpus with one Ladd, who was committed to priſon by the high Commiſsioners, for refuſing the oath ex officio, &c. And F. in his argument, ſaid and objected many things contrary to the proceedings of the high Commiſsioners; For which he was convented before them, and committed. F. brought a prohibition, and in that ſhewed the antiquity of the Innes of Courts, and that he was a Barreſter of Grays Inne, and of Counſel for his Fee, with Ladd. And afterwards F. brought an habeas corpus, and in that Lees caſe was bought, That L. being an Atturney of the Court, was committed by the high Commiſsioners, and afterwards was bayl'd, Becauſe of his neceſſary attendance in Court. And that ſo it was alſo rul'd in one Mittons caſe in the time of the Lord Dyer. And in that caſe it was agreed, That the high Commiſsioners may commit to priſon. And Fuller now was remanded.

Buck *againſt* Amcotts.
H. 5. Iac. B. R.

IN a prohibition. The Defendant ſaid, that in Hornechurch in Eſſex are Chappels of Caſe, (viz.) Rumford and Haveringe Chappels, and that they of Haveringe have uſed time out of mind, &c. to contribute to the reparation of Rumford: and that in the time of H. 4. virtute literar. patent. et concurrentibus iis, &c. And Rumford was pulled down, and erected in a more convenient place within this precinct and circuit, (viz.) twenty eight foot longer, and fourteen foot broader. Noy, That it does not lie.

1 Virtute literar. patent. in general is not good. But the Patent ought to have been ſhewn in hæc verba, or produc'd in Court; by which the Court might judge: For a new Church cannot be erected without Letters patents, Becauſe it is a Sanctuary, ve. 5. E. 3. 26. 1 H. 7. 25. and 22 E. 4. The Lord Liſlees caſe.

2. The preſcription is gone, by the erecting in another place, and longer, &c. as aforeſaid, ve. 4 Rep. P. 6. And that ſhall be taken ſtrict, Perkins 761. 7 E. 4. 27. 10 E. 3. 23. But the Court was on the contrary, Becauſe it is pro bono publico, and in ſuch a caſe a pleader, by concurrentibus iis, is good. As of an Union, 11 H. 7. 8. And that the Conuſans for reparation of the Church, appertains to the Spiritual Court. And is not like the caſe of a tenure, 4 Rep. 86. Becauſe the tenant by that is put to a greater charge; and no profit or benefit accrews to the tenant, as it does to the pariſhioner. And Eaſter Term enſuing, a Conſultation was granted by the Court.

Sir Robert Millers Caſe.

ADjudged by the Court, That a man cannot be puniſht by the Statute of 5 Eliz. cap. 9. for perjury in his own cauſe, as wager of Law, &c. But by that he ſhall be indicted at Common Law, and it was commanded to be ſo obſerv'd from henceforth; and that it hath been ſo adjudged.

NOte by the Court, that if a warrant of Atturney be entred in any term pendente placito, before Judgement, That that is good enough; and for that, a certiorari to ſearch in one term particularly is not good; But it ought to be general. For otherwiſe a Judgement may be revers'd without cauſe.

Haris's Caſe.

HE ſteals cattell, and ſells them at Coventry, in an open Market, and immediately he was apprehended by the Sheriffs of Coventry, and they ſeiſed the money; and afterwards the thief was arraign'd & hanged at the ſute of the owner of the Cattel. And by the Court, the party ſhall have reſtitution of the money; Notwithſtanding the words of 21 H. 8. The goods ſtollen, &c. And by Crooke, that it is uſual at Newgate.

Horne *againſt* Taylor.

ADjudg'd, that whereas T. had a way over the cloſe of H. and H. ſows that cloſe, and leaves a way in another place of that cloſe, within the ſame cloſe; that yet T. may well juſtifie to goe, where the antient way was: and is not bound to go in the way that is unplow'd: and accordingly it was adjudged, M. 6 Iac. Horne againſt Woodlacke.

Mary Palmer *againſt* Anthony Harſey.

IN an Ejectione firm. The caſe was thus, Leſſee for years dies Inteſtate, adminiſtration is granted to A. and P. A by Indenture grants that for 3 years to P. the Plaintiff, who now brought the action in her own name. And upon that the Evidence being mov'd for the Defendant, the Counſel of the Defendant offer'd voluntarily to have it ſo ſpecially found; But the Court delivered no opinion. But the verdict paſt againſt the Plaintiff upon another point.

Sturgion *againſt* Dorothy Painter.

THere was articles drawn between A. and S. (viz.) Articles agreed upon &c. Imprimis A. doth demiſe his cloſe to S. to have it for 40 years, and a rent reſerv'd; with a clauſe of diſtreſſe, &c. In witneſs whereof, &c. And afterwards there was written in the ſame paper, a Memorand. that theſe articles are to be ordered by Counſel of both parties, according to the due form of Law. And becauſe the intent of both parties appeared by that Memorand. and the leaſe was drawn by the Counſel, but never ſealed, (for the parties diſagreed about *Fireboot*) It was rul'd upon evidence in an Eject. firm. by the Court, That the articles were not a ſufficient leaſe; and the Jury found accordingly, without departing from the barr.

Falder

Falder *againſt* Ridge.

F. brought treſpaſſe againſt R. in the Kings Bench. And upon demurrer upon plea of the Defendant, it was adjudg'd for the Defendant. F. brought errour in the Exchequer Chamber, and there the Judgement in the Kings Bench was revers'd, but no writ of enquiry of damages might be awarded out of the Exchequer Chamber, by the Statute 27 Eliz. cap. 8. Lege. And now F. ſues a writ of Enquiry out of the Kings Bench, and well; For the firſt judgement being revers'd is not a barre.

Sir Chriſtopher Hodſman *againſt* John Griſell.

Upon evidence to the Jury. By the Court that an action upon the caſe for words lyes againſt an Infant of 17 years of age. For malitia ſupplet ætatem.

Note by Yelverton., That if an Executor pays a debt upon a uſurious contract That that is a Devaſtavit. ve. 4 H. 7.

Davis *againſt* Anderſon.

Debt brought againſt A. by D. in a Court baron, and Judgement for it, and 44 s, 6 d. for coſts and damages, and upon that Judgement there, D. brings it alſo in the Kings Bench. And Judgement by the Court for the Plaintiff. See yet 4 Rep. 30. b. which ſeems to be contrary. But that was for damages given by the Statute. *Intr. H. 5. tit. B. R. rot. 329.*

Ventres *againſt* Carter.

Errour upon a Judgement in Cambridge, becauſe the cauſe of action is laid to be in a Cloſe called Bl. acre, and it is not averr'd, that it was infra Iuriſdictionem. ve, Kellw. 33. a. 89. a.

2. The Judgement was entred ideo videtur. And by the Court, Judgement ſhall not be by a videtur. And Judgement for thoſe cauſes was revers'd.

Gore *againſt* Stark.

Two Churchwardens ſue S. for reparation of the Church according to the tax aſſeſſ. S. pleads he always offered to pay. By which the ſentence in the Spi. Court paſs'd againſt them. Then they appeal, ſentence is repeal'd and 15 l. coſts given to them, they ſue for that 15 l. in the Spi. Court. And S. pleads a releaſe of one of the Churchwardens. And in a prohibition it ſeem'd to the 3 Juſtices, That that releaſe is a barr againſt the other, and that if it be diſallowed in the Spiritual Court. By the Court it was ſaid a prohibition ſhall lie. 7 Jac. B. R. rot. 852. A Conſultation in ſuch a caſe was granted, for the Churchwardens in ſuch a caſe are a corporation for the benefit, but not for the prejudice of the pariſh. 13 H. 7. 9. 11 H. 4. 12. And they ſhall recover the coſts, to the uſe of the Church, And the releaſe ſhall be well enough determined there, where the ſute was commenc'd.

Note, if a man ſues in the Spiritual Court, preſcribing to have a ſeat in a Church ratione Meſſuagii where he inhabits, And upon the

motion of Serjeant Henden. A prohibition was granted, for it is a temporal thing.

Kendridge *againſt* Pargettor.

IN a Replevin, The Plt. ſhews that there is a field, the Franktenement whereof belongs to the Plt. and that at certain times of the year the Plt. ſhould put in but ſo many horſes only, according to the cuſtom, And that the Defendant had Common there for his Cattel, and that he had diſtreyn'd the Cattel of the Plt. there damage feaſant, becauſe there were more than 3 horſes. And the iſſue upon the cuſtome is found for the Defendant. And adjudg'd that ſuch cuſtom is good, and that the owner of the land or ſoyl of the waſt or Common may be ſtinted for the number of his Cattell. But it ſeem'd that he ought to allege the cuſtom alſo to diſtreyn the Cattel of the owners of the ſame land.

Thompſon et alii.

THey had acknowledged a Statute Merchant, and Judgement was had upon it in the Common bench, and the land of Thompſon only was extended, becauſe the other had not any thing. Now he brought errour in the Kings Bench, and the Judgement in the Common Bench was reverſed. And now the queſtion was, If they both may joyn in the ſcir. fac. for to have reſtitution of that which they loſt, and the mean profits; where in truth one of them had not loſt any thing; but reſolv'd by the Court that they may joyn, and that the words of the reſtitution to Thompſon only, may be good enough, becauſe he only had ſuſtained the loſſe. Alſo both were parties to the firſt Judgement, and to the reverſal of it, and by the reſtitution he that loſt nothing ſhall recover nothing.

Dr. Meadhouſe *againſt* Dr. Taylor.

A Prohibition for a ſute in the Spiritual Court, for tithes of rent in London. It was held by the Court, that by 38 H. 8. cap. 12. the ſute ought to be before the Maior of London, by complaint in writing, and not by word of mouth only, in nature of a monſtrans de droit, declaring all the title. And if the ſute be in the Spiritual Court for tithes in London, That Court may grant a prohibition, and yet that Court hath not power to meddle with them.

2. It was reſolv'd, that a reſervation by Leſſee for life, who leaſes for years to A. is not ſufficient to bind him in the reverſion, to pay tithes according to that rate.

3. That a rent for half a year, and afterwards for another half year, is a yearly rent within the meaning of the decree, And note, as the ſame was laſt let, is not intended laſt before the decreee, but before the demand of the tithes.

Rames *againſt* Machin.

IN an Ejectione firm. by the Court. That a leaſe for years for an Infant to try the title, is good enough, becauſe it is for his advantage. Note 21 H. 6. 31. Letter of Atturney by an Infant to receive livery and ſeiſin for him.

Heale

Heale *againſt* the Church-wardens of Hobton.

They ſued H. in the Spiritual Court, for a tax aſſeſſ, for the reparation of the Church. H. ſues a prohibition. And after a conſultation was granted. Then H. ſues an appeal to the ſuperiour Court; And then he prayd another prohibition. And it was urg'd that it was out of the Statute. But Fleming and Williams were on the contrary. And that that was within the Statute; Becauſe it was upon an appeal in the ſame Caſe.

Secondly, That the rate was made perpetuis duraturâ temporibus. But all agreed that that is not good to bind the Inheritance. But yet it is good by way of direction. How and how much ſhall be levyed as need requires.

Sir Nicholas Pogars Caſe.

AN Indictment upon 8 H. 6. was quaſht. Becauſe it was in quoddam meſſ. Exiſtens. lib. tenent. in, &c. And did not ſay, adhuc exiſtens. And for that fault the party was diſcharg'd. And it was rul'd accordingly. P. 42 Eliz. Br. rot. 27. Stansby againſt Croxton.

Pinckard *againſt* Ridge.

IN Covenant. P. ſaid that R. demis'd to him for life per dedi et conceſſi. And that a Stranger had an elder title for years, and had entred. The Defendant pleads, that the Plaintiff had a Warrantia chart. hanging againſt him for that land; And by the Court that was held no plea. For by the Covenant he ſhall recover damages only: but by a warrantia chart. he ſhall recover in value. And that the Covenant well lies. Becauſe an eſtate for years onely is evicted. Otherwiſe it had been; if all the eſtate for life had been evicted. ve. 17 E. 3. 28. Covenant 8. alſo N. B. 134. That ſuch a Leſſee ſhall not have a warrantia chart. But the Leſſor himſelf. But he may have a Covenant againſt the heir.

Scaddings Caſe.

A Habeas corpus was awarded for him, being impriſon'd in the Admiral Court. And the cauſe was returnd to be, One Eaton being there impriſoned for piracy. S. excited him to break the priſon, and helpt him out with a Ladder of Ropes. And by Fleming, Fitzwill. and Crooke, That he is well impriſon'd there, and the cauſe good, although that the offence was done in Corpore comitatus, For the offence of breaking and ayding out of priſon, ſhall be of the ſame nature as the principal offence; And for that the party was impriſon'd 1 H. 7. 6. Yelverton was onely on the contrary. And the priſoner was remainded and was not diſcharg'd.

B. And two others ſues for three ſeveral libells in the Spiritual Court, and they joyn in a prohibition. And by the Court that is not good. But they ought to have had three ſeveral prohibitions. And therefore a conſultation was granted. M. 26, 27 Eliz. C. B. If A. libels againſt B. for 3 things, by one libell. B. may have one or three prohibitions. Note Dyer 171.

IN an Ejectione firm. It was found by ſpecial verdict. That A. tenant in tayle to him and his heirs males, and the remainder to B. in Fee. B. by deed enrol'd bargains and grants to Queen Elizabeth, all his eſtate, title, intereſt and demand, Habend. for the life of the ſaid A. and after his death, ſo long as he had iſſue male of his body; with a proviſo, upon payment of 20 s. to be void. A. ſuffers a Common Recovery, and dies without iſſue. B. tenders the 20 s. And reſolv'd, that that Recovery by A. hath barr'd the remainder in Fee; for the grant to the Queen was void: for it was impoſsible that ever it could take any effect, by that grant to the Queen. And iſſue in the grant, ſhall be intended iſſue male inheritable to the tayl, and ſhall not be intended of a Son of the daughter. And this caſe was put by the Juſtices. Land is given to A. and his heirs, ſo long as B. hath iſſue male, &c. B. dies, his wife being big with a Son, who is afterwards born. Yet the Eſtate of A. is determin'd; and judgement was given accordingly.

Dentons caſe.

AN action of debt was brought upon two obligations. And the Defendant pleads, Non ſunt facta, or per minas. And adjudged good by one plea.

Whitehead Darcyes caſe.

AN Indictment of Riot and Battery, &c. contra formam diverſor. Stat. it was rul'd to be good, although he does not expreſſe any Statute in certain: And the Clerks of the Court ſaid, there were divers preſidents for that.

Sanders *againſt* Patridge.

AN Ejectione firm was brought of a Boylary of Salt. And there was no doubt of it. But the caſe was argued upon points upon the Statute of 27 Eliz. Of Fraudulent Conveyances.

IN a long Prohibition, It was agreed by the Court, That a Copyholder of an Inheritance, may preſcribe in the name of his Lord to be diſcharged of tithes. And that in 44 Eliz. Crowch againſt Fryer, it was adjudg'd accordingly. And Serjeant Hatton vouch't Brewer and Neyley's caſe, in an action of treſpas in the Exchequer, That if the parſon of a Church which is not impropriate leaſes his Glebe, the leſſee ſhall pay tithes. But otherwiſe if it had been an impropriate Church, Becauſe of the Statute of 32 H. 8. of Diſſolutions. And that it was rul'd accordingly. Note Dyer 43 a.

Parker *againſt* Heblethwait.

D. had recover'd in the Court of Rye within the Cinque-ports. And now brings debt alſo upon that recovery, quod cum debit. per legis curſum recuperaſſet, without more of the proceedings there And it was doubted if that was good. Such a Count in a ſciri fac. is good, ve. 9 H. 6. 49. 18 E. 4. 7. Plow. 47. And ſo it has been try'd. And by Henden, That the recital of any particular of the proceedings of the other Court is not traverſable, 21 E. 4. 54. H. 5. Iac. B. R. rot. 229. Davies againſt Anderſon. And now in our caſe, iſſue is taken upon nul tiel record.

And

And the writ was directed to the Warden of the Cinque-ports, that he ſhould uſe the beſt means to the Mayor of Rye to ſend the Record; who returns, that the Mayor hath certified him, quod habetur tale Recordum, in hæc verba; But he hath not ſent the Record it ſelf. And for that inſufficient.

Hunter *againſt* Moone.

AN Information was brought upon 5 Eliz. cap. 4. (for uſing the trade of a Dyer, whereof he had not been an apprentice) at the Quarter Seſſions in Southwarke, and was removed by Certiorari, and traverſe taken; and upon the Evidence it appear'd, That the Defendant was a Feltmaker; And that the Feltmakers for the ſpace of 60 years laſt paſt, have us'd to dye Felts: And many Haberdaſhers depoſed, That the Colours dyed by them, was better than that which was coloured by the Common Dyers. And it was adjudged by the Court, That that is part of their trade of Feltmaker. And the Jury found accordingly for the Defendant.

Pridam *againſt* Tucker.

AN action upon the caſe was brought for words, Thou art an healer o. Felonies, and adjudged maintainable, Becauſe in Devonſhire where, &c. Healer ſignifies the ſame as hider or concealer. And the Proverb there is, The Healer is as badd as the Stealer.

Phimmer *againſt* Hockett.

AN Ejectione firm. and a tryal at Barre. The Plaintiff had declared of a leaſe made to him by Baron and Feme; And that he being out of poſſeſsion, they had made a letter of Atturney, to enter and to deliver that leaſe, and that they ſealed and delivered it. And now ruled, that the Declaration is naught; Becauſe it is not the leaſe of the wife, but of the husband onely: And that ſo it hath been adjudged in one Riches caſe. And that the Letter of Atturney of the wife is void, Becauſe it is only Executory. And the Counſel of the Plaintiff confeſt, that it hath been adjudged accordingly.

Sir William Hall *againſt* Ellis.

E. Farmor of a Rectory impropriate, libels in the Spirituall Court pro ſedile in dextra parte Cancellæ, and in his Additional libel, he libels pro loco primo, and principally in dextra parte Cancellæ. The Defendant there ſurmiſes to have a prohibition, quod eſt antiqua parochia et antiqua cancella; And that he is ſeiſed of an antient meſſuage in that pariſh, and that he and all thoſe, &c. have uſed to ſit in dextra parte cancellæ prædict. to hear, &c. And it was reſolv'd by the Court, *T. 7. Jac. B. R.*

1. That of Common Right, the Parſon impropriate, and per conſequens his Farmor ought to have the chief ſeat in the Chancell; Becauſe he ought to repair it. But by preſcription another pariſhioner may have it. But in our caſe a conſultation was awarded, with a quoad, &c. becauſe the libel and the Additional that now is all one, is pro primo loco, &c. and the ſurmiſe is only pro ſedile in dextra parte, and not pro loco primo in it.

Chriſtopher Deans Caſe

By the Court, That if an Archdeacon make a general mandat for the induction of a Parſon (viz.) univerſ. perſonis vicariis Clericis et literatis infra Archidiaconat. meum ubicunque conſtitut. That if a Miniſter or a Preacher who is not reſident within that Archdeaconry, makes the induction, yet it is good. And the opinion of the 4 Docts. of the Civil Law was ſhewn to the Court accordingly, upon a ſpecial verdict.

Brickendine *againſt* Denwood.

IT was found upon a ſpecial verdict, That the Parſon of the Pariſh makes a Collector of tithes, and that A. had licenced a pariſhioner to carry away his corn, without ſetting forth of tithes. By the Court clearly, that licence is void. ve. 5 E. 3. 63. Plou. 104. That a Collector of rents cannot make an acquittance and diſcharge them. And a Conſultation was awarded.

Louches Caſe.

ERrour was brought to reverſe a common Recovery had againſt an Infant, and upon that ſcire fac. ad audiend. errores, Eſtrep. was pray'd. And by the Court allowed, becauſe it lies in the original writ, ſee likewiſe in a writ of Entry in the poſt.

NOte, an action upon 5 Eliz. cap. 14. for forging of an Obligation. And upon not guilty it is found for the Defendant. And upon the motion of Hitcham, It was ordered by the Court, that Judgement ſhould be ſtaid, becauſe the action is brought only in the name of the party, and not tanquam pro Dom. Rege, &c.

NOte, It was ſaid by Williams, that upon Judgement in a ſcire fac. Judgement does not lie in the Exchequer-chamber, by 27 Eliz. cap. 8. For that action is not mentioned in that Statute.

NOte, in an action upon the caſe for words. If the Defendant plead not guilty, and the Jury find part of the words, the Plaintiff ſhall recover. But otherwiſe if the Defendant had taken a traverſe to the words.

Brown *againſt* Barwick.

ERrour was brought upon Judgement in an account.

1. Becauſe the Judgement gives to recover damages. But not allowed. For the Defendant hath delayed the Plaintiff, and pleaded to the iſſue, which is found againſt him. So occaſione interplacitandi he ſhall recover damages. But otherwiſe if the Defendant comes the firſt day, and enters in the accompt taken, for to make accompt 2 R. 2. accompt 42. 5 E. 3. 40.

2. Errour was aſsign'd, becauſe upon the firſt Judgement quod computet, it was entred Defendens in miſericordia, and upon the ſecond Judgement alſo Defendens in miſer. and ſo twice puniſh'd. But that was not allowed, becauſe there were two ſeveral Judgements. And Manwood ſaid that ſo it was adjudg'd between Brown and Marſh.

Breerton

Breerton and his Wife.

They brought an action upon the caſe upon an Aſſumpſit to the wife, dum ſola fuit againſt 3. By the Court it was rul'd,

1. That if 3 aſſume, and one dies, the Survivors ſhall be charg'd. But if they are alive the action ſhall be brought againſt them all.

2. If 3 aſſume to pay or give &c. upon requeſt, &c. If the requeſt be made to one of them it is good.

Ayres *againſt* Oſwall.

An action upon the caſe for theſe words, Thou art a Thief, and haſt ſtollen my Appletrees out of my Orchard. By the Court maintainable. But otherwiſe it had been if he had ſaid, For thou haſt ſtollen, &c.

Brumley *againſt* Todd.

T. aſſums, that if B. marries his ſervant, &c. that he will give him 50 l. And the Plaintiff in the aſſumpſit ſhews, that he had taken the ſervant to wife, and that the Defendant licet ſæpius requiſit. hath not payd, &c. And it was moved in arreſt of Judgement, That the Plaintiff hath not ſhown, that he had given notice of the marriage to the Defendant: And yet Judgement was given for the Plaintiff. And a preſident was ſhewed in 34 Eliz. An aſſumpſit to pay 100l. at the day of marriage, and no notice was ſhewn, and yet good, and affirm'd upon errour brought.

Stone et alii *againſt* Browicke.

Two tenants in Common (And ſo expreſly ſaid in the Declaration throughout) bring an action upon the caſe againſt B. for ſtopping of a River, ſo that it overflowed the Meadow whereof they were tenants in Common. And well, for that is but a treſpaſſe upon the matter; In which they may joyn. But in forging of falſe deeds or ſlander of title: They ought to ſever. For that prejudices them with reſpect to the Inheritance, and Franktenement. And ſo 'twas now adjudg'd.

Symonds *againſt* Barham

Errour upon a Judgement in the Common Bench in an Ejectione firm. brought by a Gardian in Soccage, becauſe he has not ſhewn in the writ that the heir was within age at the time, &c. But by the Court it is yet good. And Judgement affirm'd. But note that the nonage of the heir appears in the Declaration 14 H. 4. 13 bre. 471. 17 E. 3. 30. 32 Eliz. C. B. rot. 733. Aſſ.

Loyds Caſe

A Reſcous was returned againſt Evanum alias Ievanum Loyd, which appears upon the Eſigent. And by the Court the Reſcous is naught, becauſe he cannot have two Chriſtian names. *M. 7. Jac. B. R.*

Iohn Rivet *againſt* Dowe.

The Lord may diſtreyn the Copyholder for the ſervices, or he may ſeiſe the Copyholders land.

Chambers's Case.

A Prohibition was awarded to the Court of the Bishop of Oxford. For that, that Ch: was sued there for a perpetual charge impos'd upon his Land, for the reparation of the Church. For by the Court, an inheritance cannot be charg'd with that.

Cox *against* Small.

The Plaintiff brought two actions upon 2 E. 6. for treble damages, &c. and he is non-suited in one action, and discontinues the other, And by the whole Court that the Defendant shall not have costs, by 8 Eliz. cap. or 4 Jac. cap. 3. Because if the Plaintiff had recover'd he should have recover'd but thetreble damages only, by the Statute.

Note, an Executor brought an action of debt upon an Obligation to the testator, and is non-suted. And by the five Judges, the Defendant shall not recover costs, by 4 Iac. cap. 3. for although that the words are generall; yet they ought to have a general construction. And that in M. 3 Iac. B. R. upon 8 Eliz. cap. 1. It was so rul'd.

Ford *against* Pomroy.

H. 7. Jac. B. R. Baron et Feme Lessees of a Parsonage, &c. The Parishioner sets forth the tithes fraudulently, and presently takes them away again, As it appears upon the evidence. And the husband only brought the action, upon 2 E. 6. For the treble damages. And it was resolv'd, That debt lies for treble damages, upon such a fraudulent setting forth of tithe although that the clause of treble damages speaks nothing of fraud.

2. But it was resolv'd, That the Husband and Wife ought to have joind in the action. Because it is not for a thing in possession. And if the Husband dies the wife shall have the damages, and not the Executor of the Husband.

Darson *against* Hunter.

Copyholder had us'd to have Common. The Lord by Deed grants and confirms to him in fee. And adjudg'd that the Common is gone. *Intr. Tr. 7 Jac. rot. 234.* For the custome for the Common was individual from the Copyhold Estate; Which is now gone by the Confirmation. And so it was adjudg'd For a custome to have loppings of trees for Estovers in M. 32, & 33. El. rot. 367.

Beade *against* Orme.

P. S. Iac. B. R. Upon the traverse of an Indictment upon the 8 H. 6. of forcible Entry: And upon the evidence, amongst other things it was resolved.

1. If two come to make a forcible entry, and one of them breaks open the door of the house, and 2 or 3 hours after, the other enters peaceably, without a weapon, the door being open; yet it is a forcible entry by him.

2. That is a forcible entry, although no person being in the house at

at the time of the Entry; if that be an ordinary dwelling houſe, &c.

3. By Yelverton, That the putting back of the bolt with his hand, or drawing up of the latch, is a forcible entry; which was granted.

NOte, it was ruled in full Court, If a ſentence be given in the Spiritual Court, and coſts tared, and the Defendant brings an Appeal: yet if the ſute did not appertain originally or properly to them, as tithes of trees ſpent in fewel: A prohibition ſhall be awarded as well to the coſts, as to the principal ſute. Notwithſtanding that the 32 H.8. cap. 7. ſays, That the Eccleſiaſtical Judge ſhall compell the Appellant forthwith to pay coſts. This is, when the caſe appertains properly to the Spiritual Court.

Okeley *againſt* Salter.

IN an action of treſpas againſt the Churchwardens, where by the Statute 43 Eliz. cap. 2. If for a diſtreſſe taken by them, for money for the relief of the poor: treſpas be brought againſt them; and verdict paſſe for them, The Defendants ſhall recover treble damages with their coſts, And that to be aſſeſt, &c. by the ſame Jury, or by writ of enquiry of damages, It was reſolv'd,

1. That the coſts ſhall not be trebled but only the damages.

2. The treble damages are well aſſeſt by the Jury, although that it be not done by the Court. Becauſe the words are, (by the ſame Jury to be aſſeſt) and not damages to be trebled by them.

Sir Richard Francks caſe.

THe very point of Hargraves caſe, 5 Rep. 31. was agreed and reſolv'd. And that that caſe was after revers'd in the Exchequer chamber, but it was for another cauſe. And Williams ſaid, That he had view'd the very Record of that caſe accordingly, In which caſe is, If A. brings debt againſt B. as Adminiſtrator to I. S. without ſaying that I. S. died inteſtate. But yet it is good. For it may be that I. S. made a will and teſtament, and yet Adminiſtration might be committed to the Defendant by refuſal, &c. But otherwiſe it is where the Plaintiff is Adminiſtrator. There he ought to ſhew that the party died inteſtate.

Sir Iohn Ratcliff *againſt* Davis.

IN trover and converſion for a hat-band ſet with Diamonds. The caſe was this, R. pawns it to A. for 25 l. without any day certain for the redemption; A. delivers it to D. A. makes B. his Executor and dies, R. tenders the money to the Executor, who refuſes it. R. demands the hatband of D. who alſo refuſes; and R. brought an action of trover: And it was reſolv'd,

1. That the goods pawn'd without any day of redemption, are not abſolutely gone, by the death of him to whom they were pawned. But otherwiſe by the death of him that pawn'd them, vc. Litt. 334.

2. The tender to the Executor, although it be not any payment in Fact, And the requeſt after to the Defendant, veſts the property of the pledge in the Plaintiff. And ſo adjudged.

A. gives in tayl to B. an alien, the remainders to C in Fee. B. ſuffers a Common Recovery: and after Office is found The alien dies without iſſue. Yet that Recovery ſhall bind C. in the remainder.

Note many Preſidents, that by determination of Commendams retinere, *be it by Death, Reſignation, Tranſlation, or otherwiſe, it belongs to the King to preſent.*

By Reſignation. JOhn Flower was preſented by the Queen 21 Eliz. 159. to the Prebendary of Caddington Major, from St. Pauls London, after reſignation by John Biſhop of Rocheſter, who held it by Commendam Retinere.

Andrews was preſented by the Queen 31 Eliz. 1599. to the Prebendary of North Paſham in Norke, by reſignation of the Archbiſhop of York; who had a Commendam Retinere.

Richard Rennighton, &c. 32 Eliz. 1600. to the Archdeanary of the Eaſt Riding in York, by reſignation of John Biſhop of Carliſle; who had a Commendam retinere.

Morgan Jones, &c. 39 Eliz. to the Treaſurerſhip of Landaff, by reſignation of Gervas Biſhop of Landaff.

John Goodwin, &c. 33 Eliz. to the Rectory of Norton, by reſignation of the Biſhop of Bangor, who had a Commendam retinere.

By Death. John Underhil, &c. 27. Eliz. to the Rectory of Northapp, by the death of the Biſhop of Bangor, &c. Aſaph.

John Robins, &c. 36 Eliz. 1594. to the Rectory of Benne, by the death of John Biſhop of Exeter, &c. Devon.

Thomas Jones &c. 43. Eliz. 1600 to the Rectory of the Caſtle, by the death of William Biſhop of St. Aſaph. Aſaph.

David Humphrys, &c. 43. Eliz. 1600. to the Rectory of Liſmaine, by the death of William Biſhop of St. Aſaph. Aſaph.

Dr. Eden, &c. 43 Eliz. 1600 to the Prebendary in the Church of Hereford, by the death of Godrey Biſhop of Gloceſter, &c. Hereford.

William Helier, &c. 45 Eliz. 1602. to the Vicaridge of Haverton, with the Chapel annex'd to it, by the death of John Biſhop of Downe and Conier in Ireland, &c. Devon.

Thomas Playford, &c. 3 Iac. 1606. to the Rectory of Clapham, by the death of Anthony Watſon, Biſhop of Chicheſter, &c. Surrey.

By Tranſlation. Walter Bennet, &c. 4 Iac. 1607. to the Rectory of Little Wittam, by the tranſlation of Dr. Ravile of Glouceſter to London. Berks.

John Barham, &c. 8 Iac. 1611. to the Biſhoprick of Landrich, by the tranſlation of Henry Biſhop of Glouceſter, to Worceſter, &c. Kent.

William Powell 15 Iac. 1618. &c. to the Rectory of Lambeth, by the tranſlation of Doctor Goodwin from Landaff to Hereford, &c. Southampton.

Chriſtopher Foſter, 11 Iac. 1613. &c: to the Rectory of Calborne, by tranſlation of Dr. Hampton of Derrey in Ireland, to the Archbiſhoprick of Armagh. Southampton.

By Determination. Dr. Hugh Gray, &c. 42 Eliz. the Rectory of Peanſtock, by promotion of Dr. Cotton to Sarum, who held it for two years, by Commendam retinere, &c. Southampton.

Dr. Donne, &c. 14 Iac. to the Rectory of Sabenoke, by promotion of Dr. Pilburne to St. Davids, who held it by Commendam retinere for a year, Kent.

There are infinite numbers of ſuch Preſidents.

The

THe Parſon and Churchwardens in London by the cuſtom are a Corporation, and the Pariſhioners time out of mind, &c. have uſed at a certain day in the Veſtry to elect Churchwardens. They elect A. and preſent him to the Archdeacon, who refuſes A. and forbids him to exerciſe the Office of a Churchwarden, becauſe the Parſon pretended, that by the new Canon the election of a Churchwarden belong'd to him to diſpoſe, &c. and exerciſe the office of Churchwarden. And A. is ſued ex officio in the High commiſſion court, amongſt other things touching that, A. prays a prohibition, becauſe the Canon does not take away the cuſtom. Alſo it would be very miſchievous if the Parſon ſhould elect whom he pleaſe to be Churchwarden. And the Parſon & Churchwarden being a corporation, then they may diſpoſe of the goods and lands of the pariſh as they pleaſe. Cook chief Juſt. ſaid, that a convocation hath power to make conſtitutions for eccleſiaſtical things or perſons. 20 H. 6. 14. 21 E. 4. 46. But they ought to be according to the law and cuſtom of the Realm. And they cannot make Churchwardens that were eligible, to be donative, without Act of Parliament, and the Canon is to be intended where the Parſon had nomination of a Churchwarden before the making of the Canon. And now rule was given for a prohibition, if cauſe be not ſhewn to the contrary, &c. ex motione. Serjeant Foſter. *Mich. 4. Jac. C. B.*

NOte, it was mov'd in arreſt of Judgement by Sherley in an Aſſumpſit. The Plaintiff declares of a promiſe made at D. to pay 10 l. to S. &c. and iſſue joyn'd upon non aſſumpſit. And the iſſue was awarded from S. where it ought to have been from D. And for that Judgement was arreſted, for that is material and not aided by the Statute of Jeofayles. By the Court: But it had been good, if the iſſue had been joyn'd upon the payment.

Andrews *againſt* Lakin.

IN Trover the Plaintiff, P. Iac. 4. upon the imparlance Roll he declares of a Feather-bed, and T. 4 Iac. he declares of a Feather and Flock bed. Alſo upon the general iſſue it is found for the Plaintiff, and 6 l. damages given. And Walmſly and Daniell only in Court, That the Plaintiff ſhal not have Judgement; For the writ is general, and demands nothing in certain, but the Declaration upon the Imparlance Roll, is the original and warrant of the ſecond Declaration. So that the addition of the Flock-bed is ill, and the damages are intirely given. And for that the Plaintiff ſhall not have Judgement.

Sir Richard Vernon's Caſe.

DEbt againſt A. B. and C. by 3. ſeveral præcipes, and is at iſſue upon non eſt factum with A. And when the Jury returned to give their verdict, the Plaintiff is non-ſuted. And the Entry was non proſequitur de verdicto habendo. And by the Court that is moſt barbarous, for it ought to have been non proſequitur bre. ſuum, and the non-ſuite againſt one is the non-ſuite againſt all. But otherwiſe of a diſcontinuance as to one, &c. vr. 7 H. 6. 27. 21 E. 3. 36. 27 E. 3. 87. And another day the opinion of the Court was, That if a treſpaſſe be brought againſt two, et non proſequitur againſt one, that is a retraxit, and may ſtand againſt the other. Note, the reaſon was becauſe of the benefit of the King; For if he ought to be found guilty of a treſpaſſe, being vi et armis, a Fine is due to the King.

Note,

NOte, Harris mov'd to paſſe a common Recovery, in which an Infant was vouch'd. Cook ch. Juſt. That a common Recovery is the common aſſurance, and is a forfeiture of the eſtate. 1 Rep. 15. And by that means the wiſdom of the law, for tryal of Nonage ſhall be ouſted, and the examination of the Infant taken away. And he was againſt it, M. 3. Iac. B. 4 Iac. So was the opinion of the whole Court. And Cook then ſaid confidently, That that ſhall not bind the Infant. So alſo he affirm'd p. 6. Jac. And ſaid that Popham held accordingly.

Sommers Caſe

A Variance of the name of a Juror in the venire fac. and in the poſtea (Ieronimmus with one m) too much, The venire fac. cannot be amended. But Cook ſaid that it ſhall be taken for Ieronimus without any amendment. Alſo a writ of Errour awarded to the Juſtices of Aſſize before whom the Judgement was given, was good.

Edwards's Caſe.

HE was found to be a Bankrupt by 13 Eliz. 7. And was committed to the Fleet, The Warrant to the Warden of the Fleet was, to return and keep in priſon, to anſwer and to ſatisfie all ſuch matters as ſhall be objected againſt him. The queſtion now was, if the Commiſsioners may licence him to go at large to treat about his debts. By the Court, If the Warrant had been, that the party ſhould have been in Execution, then he could not be inlarg'd; but the Court adviſed them to take ſecurity, leſt he ſhould withdraw himſelf: But if one had Judgement againſt a bankrupt, And upon a Habeas corpus brought he is committed in Execution, without a cap. utlagat: Then the Commiſsioners cannot deal with him any more, for to enlarge him.

Oldfeilds Caſe.

IN an Aſſumpſit upon a general iſſue it was found for the Plaintiff. Hutton mov'd in arreſt of Judgement, becauſe it appears by the Declaration, that the Plaintiff ſold clothes to A. 20 Decemb. And the Plaintiff there preſent aſſum'd, That if A. did not pay, he would, &c. And it appears alſo the 20 of Jan. enſuing. The Plt. had accepted of A. a bond for all the ſum upon the contract, by which the contract is determined, and diſcharged: And by conſequence the Aſſumpſit of the Defendant, which depended upon it. By the Court then the Judgement ſhall be ſtaied. For it is all one, as if A. had paid it, or the Plaintiff had releas'd the debt due upon the contract. But Altham of the other part ſhewed, That upon the contract the agreement was, that A. ſhall pay in hand 13 l. and that he ſhould make a Bond after for the reſidue to the Plaintiff. And in conſideration that the Plaintiff would ſuffer A. to have the clothes, and for 6 d. given in earneſt he aſſumes. So that the Bond is perſuant and part of the contract, and agreement, and does not deſtroy it. Then by the whole Court Judgement ſhall be entred for the Plaintiff, ſaying to the Defendant, your word is better than the others bond, and rule for Judgement accordingly.

Sr.

Sir Fulk Grevill *againſt* Stapleton

IN a replevin, it was found by ſpecial verdict a private Act of Parliament 27 H. 8. for intailing lands, &c. called Littlewood, alias Littwood, to the Anceſtor Sir Henry Grevill, with a reſtraint to make leaſes but for one life, rendring the ancient rent. Or for a Joynture to his wife. And they found alſo the Statute 32 H. 8. cap. 28. And the queſtion was, If the Statute 32 H. 8. hath taken away the reſtraint of the Statute of 27 H. 8. which is particular, and 32. H. 8. being general, and in the affirmative. And by the Court, not. ve. 21 H. 7. 17. And that it was adjudged by all the Juſtices of England, That it is in the Original, but not in the printed Book of the Lord Dyer. And that 16 R. 2. cap. 5. Of a premunire, Hath not taken away the Statute of W. 2. And that the eſtate tayl is not forfeited by that. But yet it is forfeited by 26 H. 8. cap. 13. for treaſon. Note the words of that, Any Eſtate of Inheritance; which is ſtrong and preciſe. I may enter upon my villain, if he be enfeoff'd, notwithſtanding the Statute of Marlbr. And that if I bring an action againſt him, he ſhall be infranchis'd. And the word (notwithſtanding) in 32 H. 8. is, As to the Eſtate tayl; but not as to the particular Statute. And the Statute of Glouceſter does not extend to waſte in ancient demean, ve. 1. H. 7. 13 Dy. 48 b. That he ſhall not alien an Eſtate in Fee.

2. If the rule be for judgement, per Hunc & Tunc, and after one of the parties dies, ſuch a rule cannot be given after, as to a continuance to another day, Becauſe there is none that can appear for him that is dead.

3 But becauſe the priſell was laid in Littwood, and the Jury found the intayl of Littlewood, alias Littwood, without ſaying that the entail was of the lands aforeſaid; or that, Littlewood, or Littwood, are in one and the ſame place; For that fault only Judgement was given againſt the Plaintiff. Note an Inference by Harris, upon Sir George Browns caſe, That a Joyntreſſe in tayl, by 11 H. 7. cannot make leaſes for 3. lives. But the Court was on the contrary.

Bendick *againſt* Thatcher.

B. had recover'd in the Common bench againſt T. by judgment. T. petitions the King to referre the matter to 3 Juſtices. They make an award, B. will not ſtand to it. T. ſues him in the Court of Requeſts, for performance of an award. B. confeſſes the Reference, but denies his conſent to it, or aſſent of the award. And yet for not ſtanding to that award, he was committed to the Fleet by the Court of Requeſts, and now B. brought an habeas corpus.

And by the Court this difference was agreed, When the party ſubmits himſelf to an arbitrament, by an extrajudicial courſe, as by conſent, there he cannot be ſued in Equity, or impriſoned for non-performance of the award; Unleſs he hath any time agreed or aſſented to it. But when by any Court the matter is referr'd to Gentlemen of the Country, and the party will not ſtand to it, the Court may commit him. For upon the matter, that was the award of the Court. So that now in our caſe B. was let out upon bayl; yet the Court would not grant a prohibition to the Court of Requeſts. And Cook chief Juſtice (in that difference before) ſaid confidently, That the party might have an action upon the caſe, if the other would not perform the Arbitrament: by which he is damnified, Quod nemo dedixit.

Smith *againſt* Payter.

A Writ of covenant was brought in London, and the breach was alleged in Hertfordſhire. The Plaintiff had Judgement upon a nihil dicit. By the Court, and the Prothonotaries ſaid, That the writ of enquiry of damages, ſhall be awarded to London, and not to Hertford; for the action is laid in London; allthough that the thing, in which the breach is alleg'd, was meerly local, becauſe damages only are to be recover'd, As in treſpas in London the Defendant pleads a Releaſe, &c. at Hertford, that ſhall be tryed in London. And that is but a Jury of Office, whereof no Attaint lies.

Calchmans Caſe.

By the Court. If an Obligation be taken in the name of another to the uſe of a Bankrupt, the Commiſsioners may well aſsign that; Unleſſe the other party hath of his own mony paid and ſatisfied debts due by the Bankrupt. In conſideration of that alſo Creditors within 13 Eliz. are intended, for merchandizes, &c. and not Creditors upon counterbonds. And the Commiſsioners ſhall judge of that. For if they make an Aſsignment to ſuch creditors, ſuch allegations afterwards come tarde. For the Statute veſts the thing aſsign'd in the party to whom, &c.

Gray *againſt* Briſcoe.

B. covenants, that he was ſeis'd of Bl. acre in fee-ſimple, where in truth it was copy-hold land in fée, according to the cuſtom. By the Court, the covenant is not broken. And the Jury ſhall give damages, in their conſciences, according to that rate, that the Country values Fee-ſimple land, more than Copy-hold land.

Strange *againſt* Foote.

Intr. P. 2. Jac. C. B. rot. 1320.

The ſole point upon the ſpeciall Verdict was, If one Prideux being admitted and inſtituted to a Prebendary, with the cure, 4 Eliz. he being but of Nine years of age. Notwithſtanding the Statute, it is meerly void. Note 4 H. 6. 3. That if the Feme of an Infant, under 14. years, hath iſſue, it is a baſtard.

Abigall Baker *againſt* Mounford.

IN an Ejectione firm. the point was, The Patron takes an Obligation of the Clerk (which he preſented) That he ſhould pay 10 l. to the Sonne of the laſt Incumbent, ſo long as he ſhould be a Student in Cambridge unpreferr'd. By the Court, adjudged that that was not Simony. Otherwiſe if it had bèn to have paid to the Son of the Patron. Foſter Juſtice vouch't the Earl of Suſſex's caſe. An Obligation made by the Preſentée to the Patron, to pay 5 l. annually, to the wife and children of the late Incumbent. And notwithſtanding great oppoſition to the contrary, The Parſon kéeps and enjoys his parſonage to this day. And judgement accordingly, by verdict in our caſe.

A. recover'd in debt againſt B. A. brought a ſcire fac. B. pleads that A. is outlawed, &c. That is a good plea if he be outlawed after the plea in barr pleaded in the action of debt, but otherwiſe it is if he be outlawed before, for then B. might have pleaded that in bar in the firſt action: And that if in our caſe. The money being in Court, the Kings Serjeant prays to have it for the King; He ought to ſhew the Outlawry ſub pede ſigilli, and the party ought to confeſſe that he is the ſame party.

IN an Ejectione firm. amongſt other things, theſe points were reſolved.

1. Tenant in tayl of a Mannor, with an Advowſon appurt. grants the preſentment in avoydance and dies, and the iſſue enters in the Mannor, then the grant is void, but not without entry: As it ſeem'd by 3 Rep. 81. And although that ſuch a grantee preſent by colour of ſuch a grant, yet that is an uſurpation which ſhall bind, &c.

2. A leaſe for 3 years, and after for 3 years, and ſo from 3 years to 3 years, until 10 years be expired. That is a leaſe but for 9 years, and the odd year ſhall not be accounted, becauſe that does not happen to be determined by 3 years. And ſo if it had been for 20 years, &c.

3. That it was found, that the Leſſor was now incumbent; and good, although they doe not find (that he is in life) for it is more than implyed, &c.

Naſies Caſe.

AN Information upon the Statute of Uſury, for a contract with perſons unknown, recipiendo ultra 10 l. in the hundred.

1. That was held ill (becauſe with perſons unknown.) Becauſe that is not allowable, but in caſe of an Indictment, pro morte hominis ignoti.

2. That an Informer who is not party, although the contract was ultra 10 l. &c. per cent. ſhall not have any benefit, unleſſe there was a receipt of the uſury according to the contract. And for that the recipiendo is naught, becauſe there is no place nor time put of the receipt, which is now traverſable in that information.

Ray and Joyce his wife

IN waſte, Eſtrepment was directed to the party and to the Sheriff before Judgement. Although that Br. 60 v. ſays, That a writ of Eſtrepment lies in an action where damages ſhall not be recovered in waſte, but only treble damages for the waſte, before the action brought. Note N. B. 61. n.

Baylye *againſt* Knighton.

IN a partitione facienda, by Tenant in Common againſt the other, An Eſtrepment was granted, for all that the Plaintiff had conſent to be held in Common, and not of more, for by ſuch means, a man may be inhibited to cut his own bows, according to his occaſions. But Benelowes. cap. 5. fo. 4. ſeem'd, That an Eſtrepment does not lie between tenants in Common. But in M. 6. Jac. It was rul'd that the Eſtrepment ſhall be granted, although that Cook ch. Juſt. held with Benelowes. But note, that in 5 Jac. Lady Lucy againſt Oxenbridge. An Eſtrepment was granted in a partitione faciend. becauſe it is a real action, and no damages to be recovered. And Brownlowe ſhewed many preſidents contrary to Benelowes.

Lady Raynor *againſt* Tho. Holcroft et uxor.

IN Dower againſt Baron and feme, the Husband appears and was eſſoign'd. The wife makes default, as well ſhe might, becauſe they appear by ſeveral Atturneys; And the ſame day is given to her, at which day ſhe appear'd, and was eſſoigned, and then the Husband makes default, et idem dies given to him. And it was reſolv'd.

1. That an Eſſoign lies in Dower. ve. 2 E. 4. 16. a. 21. b. notwithſtanding the 44 Eliz. 5. 2. And the Stat. 12 E. 2. cap. 1. That is to be intended of an Eſſoign of the ſervice of the King, or of an Eſſoign after iſſue, and ſo it was alſo rul'd in Symers caſe, and in Bedingfeilds caſe, and others.

2 The idem dies is given to him that made default. And the Court is ſo although that otherwiſe it was done in 2 E. 4. 16. a. 21. b. For that is but a diſcontinuance of the proceſſe.

3. That the Husband and wife might have ſeveral Eſſoigns.

Sir George Reed *againſt* Wainford.

IN a writ de valore maritagii, and a Jury of two Counties, 6 of either of the Counties, and the title for the tenure being clear for the Plaintiff. The Court directed the Jury not only to conſider the value of the land held of the Plaintiff. But alſo of all the other lands, leaſes, and goods, and all his eſtate, and to give damages according to the rate that a man of ſuch an Eſtate might have with his wife. And they give 40 l. although that the Plaintiff had prov'd, That one proffer'd 100 with him bona fide.

Peter Gee *againſt* Peter Longe.

TRover and Converſion was brought againſt A. and B. A pleads not guilty, and that iſſue is found againſt A. B. pleads and traverſes abſque hoc, that he and A. coverted, &c. And that iſſue is found for B. againſt the Plaintiff; Yet it ſeem'd to the Court that the Plt. ſhall have Judgement againſt A, upon the firſt verdict. For although that the Declaration be, that they converted, &c. Yet that ſhall be intendeed jointly and ſeverally: And ſo the opinion of the Court was againſt A.

Taylor *againſt* Ieanes.

IN the replication, the Plt. avows the taking as an Eſtray, &c. as bayly, &c. And that he delivered the Mare and Colt to the Copyholder of the ſaid Manor, to depaſture in a Cloſe, which is within the ſaid Manor; and that a year and a day was paſt, and that within the year the Plt. had refus'd to ſatisfie for the feeding. And in that caſe by the Court,

1. The proof of the property by the Plt. when his Catel Eſtrays, need not be by oath, but it ſuffices to be by marks, and affirmance of the Neighbours. As for wreck 39 E. 3. ve. Magna Charta cap. 2.

2. The party ought to demand the amends for the feeding at his peril. So that the reaſonableneſſe may be adjudg'd by the Court, &c.

3. The Bayly cannot delegate his authority to another, or deliver the Eſtray to be kept by another, but the Eſtray ought to be kept within the demeans of the Manor in loco aperto. So that it be obvious to the view, if ſearch be made.

Note,

NOte, that a man in Execution ſhall not have a ſuperſedeas upon an Audita querela, unleſſe it be grounded upon a ſpecialty; But he ſhall have an Audita querela upon a ſurmiſe, if he put in bayl, &c. but not a ſuperſedeas. Cook ch. Juſt. adviſ'd every Student to take notice of that. And after in many caſes it was rul'd accordingly.

Valentine *againſt* Penny.

A Treſpaſſe quare clauſum fregit, et ſolum fodit. The Defendant juſtifies, that he and his Anceſtors, and all whoſe eſtate he had in a Cottage, have us'd to have Common of Turbary, to dig and ſell ad libitum, as belonging to the houſe, &c. And adiudg'd that it is an ill plea. For ſuch a Common as aboveſaid is an inter. ſt and a Franchtenement. ve. 7 Aſſize 4. And is repugnant in it ſelf. For a Common appertaining to a houſe, ought to be ſpent in the houſe, and not ſold abroad. And Judgement accordingly.

NOte, Nichols pray'd the opinion of the Court. Leſſee of a portion of tithes (without any ſoyl or barn) rendring a rent, with a proviſo, that if the rent be not pay'd, that the leaſe ſhould be void. By Walmſly, That the Leſſor ſhall not be compelled to ſeek the Leſſee, and demand the rent of him. But the Leſſee ought to ſeek the Leſſor (he that needs muſt blow the coal) And ſo it hath been rul'd before that time. Daniel agreed expreſly, and Warberton non dedixit. Dyer. 88. a.

Welbies Caſe.

IN a quare impedit. The Plaintiff intitles himſelf to a Primor, to which there is an Advow appendant. That his father was ſeiſ'd &c. And Covenanted, without ſaying by Indenture brought here into the Court for natural affection, &c. with B. to ſtand ſeis'd to himſelf for life, the remainder to the Plt. &c. And that his father dies, and the Defendant demur'd for that fault: But by the Court the pleading is good, for the party is not privy nor party to the deed, nor hath he a remedy to come to it; and he hath the eſtate by 27 H. 8. of uſes. And now the deed properly belongs to the Covenantee. And ſo was the better opinion, in Dyer. 277. and that differs from the 14 H. 8. 7. 8. And Judgement was given accordingly.

Jeffry *againſt* John Boys.

IN a Replication in the Avowry, preſcribes to have Common appurt. but doth not ſhew and aver that the Cattel were levant and couchant upon the land &c. And for that it was held to be naught by the Court. ve. 15 E. 4. 32. But in our caſe, the iſſue was joyn'd upon the preſcription. And by the other fault is allowed as confeſt. And is helped after verdict by the Stat. ve. 5 rep. 43 a.

Cutter et uxor *againſt* Barber et ſon uxor.

IN a partione facienda by conſent quod partitio fiat. And a writ was to the Sheriff to make partition. And before that it was fil'd (but after the return) The Court being informed, that one of the wives was dead, and it was pray'd that the writ ſhould not be fil'd. By the Court. If it ſhould be fill'd, then the Court ſhould give an erroneous Judgement againſt the dead perſon. And a day was given to the other party to

ſhew, if the wife was dead. And in the interim the filing of the writ was ſtaid. But after, becauſe it appear'd that ſhe was not dead, until after the return day of the writ, to which day the Judgement ſhall have relation, It was rul'd, that Judgement ſhall be given, and the writ filed: ſo it ſhould be if the Defendant in accompt dyes before the ſecond Judgement: or if the Defendant in treſpas, after Judgement upon a Demurrer, dies before the return of the writ of enquiry of damages.

Tyrwhite *againſt* Kynaſtan.

AN action upon the caſe upon an Indebitatus exiſtit, of an Aſſumpſit. And the Plaintiff demurs, becauſe there is not ſhew'd how, and for what things he was indebted. And in H. 5 Jac. enſuing, without argument, It was clear by the Court, againſt the Plaintiff. And in P. 28. Eliz. B. R. Wood againſt Draper, That the Defendant may ſafely plead non debet, as well as in debt. By Fenner and Gawdy, and in M. 7. Jac. B. R. Ivers againſt Ingram. It was adjudged, That he ought to ſhew how he became indebted, (viz.) for merchandizes, or for ready money.

NOte by Cooke chief Juſtice, That the keeping of a Church-book for the age of thoſe which ſhould be born and chriſtened in the pariſh, began in the 30th year of Henry the Eighth: by the inſtigation of the Lord Cromwel.

Ballard *againſt* Ballard.

IN a warrant. chart. The Plaintiff ſhews that he and A. were ſeiſed in Fee, and ſo ſeiſed, that A. releaſes with warranty for him and his heirs, to B. and his heirs, (without ſaying contra omnes gentes) And the writ was of two Meſſuages, and half an acre in St. Clements Danes, &c. And the deed of Releaſe was, as it appears upon demand. And upon ſight of parcel of the land cum Edificatione upon it, with the buttals, containing in length from Eaſt to Weſt, 28. feet, &c. and in breadth from North to South, 21 feet. And upon that the Defendant demurrs, and it was adjudged againſt him. And it was reſolved, that the count is good, although it is not ſhewn by what means or conveyance they were ſeiſed, or how they were ſeiſed; For if they are tenants in Common, the releaſe is not good; or that they were joyntenants. But otherwiſe it is, when a tenant in a reall action, pleads Joyntenancy, in abatement of the writ. See for that difference 2 E. 4 11. 30 E. 3. And now agreed by the Court.

2. The variance between the writ and the deed is not material, Becauſe the Plaintiff in his writ ought to demand it in form, according to the Regiſter. Alſo, it is not any prejudice to the Defendant. For the recovery ſhall be only according to that, which the Plaintiff demands.

3. That is a General warranty, and a warr. char. lyes upon it; although he does not ſay, Contr. omnes gentes, ve. 1. Rep. 2. And judgment now given accordingly.

Evelinge *againſt* Sawyer.

IN treſpas. It was reſolved upon Evidence at barre, That where the Defendant intitles himſelf to land, by a feoffment made to A. to the uſe of the Defendant of a Manor, in which, &c. is parcel. That that was naught,

naught, Becauſe no Atturnment is ſhewn to be made to the Feoffee, to the uſe of A. although that it was ſhewn, that the tenants have paid their rent to the Defendants.

Andrews *againſt* Webb.

IT was agreed by the Court, That the Court of Chancery, may be by preſcription; as the Counties Palatine, and the Mayors Court of London, which is called the Mark Court, Becauſe the Mayor may mark any cauſe in the Sheriffs Court before judgement; although it be after verdict, and may examine it, 10 H. 6. 14. But by Cooke chief Juſtice. The Court of Chancery or Equity, cannot be by grant of the King, Becauſe it took its birthright from the Subject. And that he had ſeen the grant of the County Palatine of Cheſter to Hugh de Lupus, who was the firſt Earl of Cheſter after the conqueſt; to hold it tam libere per gladium, quam Rex Regnum Angliæ per Coronam; yet the Chancery might be before that by preſcription. And he ſaid, that the dignities before the Conqueſt, were not patrimonial, to deſcend. Which Doderidge, the Kings Serjeant affirm'd. And he ſaid, that he had ſeen Charters before the Conqueſt, with the additions of Dukes and Earls: and in our principal caſe a procedendo was granted to the Mayors court.

Randall *againſt* Knowles.

A Prohibition was pray'd upon a ſurmiſe, that the tithes, for which the ſute was, belonged to the Vicar, and not to the Parſon; By the Court, That a conſultation ſhall be granted; For the right of tithes is confeſſed. And if they belong to the Parſon or to the Vicar, that is meerly Spiritual. And that ſo it was ruled in one Buſhels caſe. The Parſon of Pancras, and in one Milbrays caſe it was adjudged accordingly.

Phillips *againſt* Slacke.

By the Court; That a Prohibition ſhall not be granted, upon a bare ſurmiſe, that he is ſued for tithes by the Parſon of D of Lands in the pariſh of S. unleſſe it appears, in the pleading in the Spiritual Court. For they there ſhall not be Judges of the bounds of the pariſh, ve. 5. H. 5. 10. 22 E. 4. 24.

Pawlinge *againſt* Baker.

AN Ejectione firm. of 10 acres. The verdict upon not guilty, found the Defendant guilty of 8 pieces, and for that cauſe judgement was ſtaid; For the verdict ought to be certain: ſo that the execution may be made of it. Alſo they did not find him guilty of the reſidue. And for that it was alſo naught.

Smith *againſt* Foaves.

IN a quare impedit, it was reſolv'd and agreed by all upon Evidence at bar.

1. That a reſignation to a Proctor, does not make the Church void, until it be accepted by the Biſhop, and acknowledged before him. So that a preſentation in the mean time was void.

2. The ſpecial verdict finds an inſtrument under the ſeal of the Biſhop, upon

upon which was indorſed, That the reſignation was acknowledged and accepted by the Biſhop; yet that is no abſolute finding that it was a reſignation in facto, as the finding of a deed with an indorſement that livery was made, is not good finding of a leaſe for life; or the finding of an acquittance of the debtee, is not good finding, upon an iſſue of plene Adminiſtravit. For it was but a circumſtance and inducement to the Jury.

Sharpe *againſt* Sharpe.

A Prohibition was prayd upon a ſute in the Spiritual Court for tithes in kinde of a Park now converted into Tillage, upon a ſurmiſe de modo decimandi, to pay a Buck and a Doe for all tithes. And allowed by the Court and agreed,

1. Although that they are feræ naturæ, yet they may be given for tithes. So to pay Feaſants, &c.

2. Although they are not tithable of themſelves, yet they may be given for modus decimandi; as a great tree may be given for tithe of trees tithable.

3. That that is a diſcharge to the very Soyl, and the Park is not but a liberty, and the owner may furniſh it with game, when he pleaſe. But after a conſultation was granted, becauſe the ſurmiſe was not proved within the 6 months. So adjudged, H. 6. Jac: C. B. The Vicar of Clare in Suffolke, who ſued for hopps. And there alſo a prohibition was granted upon ſuch a ſurmiſe. But after a conſultation was granted in that caſe. For the modus decimandi was alleg'd for diſcharge of tithes of Hay and Herbage, and not of all tithes, where the libel was for tithes of Hopps. And Cook chief Juſtice, vouch't one Shibdens caſe, That ſuch a modus decimandi generally for the Park, is not good, if it be diſparked. But it ſhall be particularly, for all acres conteined in the Park.

Pellams Caſe.

A quare impedit was brought againſt the Archbiſhop of Canterbury, (ſede vacante de Chichester) and the diſturber and the Clark. The Plaintiff had Judgement upon a non ſum Informatus. By the Court, the writ ſhall be directed to the new Biſhop, in the mean time choſen and conſecrated: although he was not party to the firſt writ, 22 E. 3. 13.

Goodwin *againſt* Tompkins.

A Sute was in the Admiral Court for ſetting a ſhip in a Wharf to the damage of the Plaintiff: ſo that none could come to his Wharf, which is ſaid within the bill to be within the Ward of Saint Mary Hill: And a Prohibition was granted; upon a ſuggeſtion, that it was good for the ordering of ſhips. A conſultation was granted, but afterwards upon good advice and opening the matter, a ſuperſedeas to the conſultation was granted, et quod prohibitio ſtet; for the wrong and fact is ſaid to be within a County and Ward; and for that it does not belong to the Admiral: and for civil contracts or treſpaſſes done upon the river of Thames, or any other River, that is proper to the Common law, triable in that County, which is next to the bank, and that ſide of the River where the fact done, but in criminal matters upon any River, that is given to the Admiral, by the Statute, 28 H. 8. cap. 15.

Norton

Norton *againſt* Glover.

IT was adjudg'd upon a Demurrer. A. makes an Obligation to Baron & feme, the Baron dies, the wife takes Letters of Adminiſtration, and brings debt upon that Obligation, as Adminiſtratrix, and declares accordingly. But ſhe dies before Judgement, and her Executor brought debt upon that Obligation. And adjudg'd that it does not lie.

1. That perſonal duty being choſe enaction, ſhall well lie in Joynture between Baron and feme. But otherwiſe of other perſonal things. ve. 4 H. 6. 6. a.

2. That is a ſufficient election and waiver. Although ſhe had Judgement to have it as Adminiſtratrix, and not in her own Right.

Thompſon *againſt* Jackſon.

IN a Warrantia Chartæ upon warranty, His Anceſtor the Defendant pleaded riens per diſcent. By the Court, That Judgement ſhall be entered for the Plaintiff without tryal if he will. For the Warranty is confeſt pro loco et tempore. For the Tryal may be long and chargeable.

The King *againſt* the Biſhop of Chicheſter.

IN a quare impedit it was doubted. If A. having two benefices with the Cure, by diſpenſation, and then takes a third benefice with Cure, If now both the firſt benefices, or the firſt of them only be void. Heron ſaid, That it was adjudg'd that both of them ſhould be void.

Arnold *againſt* Skeale.

BAron and feme joyntenants for life. The Husband he ſowes the land and dies: The Wife takes the Corn, and the Executor of the Husband brought treſpaſſe, quare clauſum fregit. And two Juſtices were againſt two, If the wife, or the Executor ſhall have them. ve. Dy. 316. a. But all agreed that if they belong to the Executor, that he may well have that action, quare clauſum fregit. For as to that intent, for the corn, the cloſe is his. 27 H. 6. 28. a.

Rooper *againſt* Buſbroke.

VPon a prohibition to the High Commiſsioners: And it was diſputed from M. 3. Iac. Until now by the Court. The High Commiſsioners have nothing to do with the intereſt of meum and tuum, or Legacies, tithes, or penſions, which are given to the King by 31 H. 8. And there was no remedy for them at the Spiritual Court, (notwithſtanding the ſaving) in 31 H. 8. until the 34 H. 8. It was enacted, which recites the miſchief, and gives Juriſdiction for them to the Ordinary, And that was before the Statute of 1 Eliz. for the High Commiſsion.

Whartons Caſe.

VPon an habeas corpus, the cauſe was return'd to be, That he being Churchwarden, and refus'd to take the oath upon enquiry of 39 Articles touching Eccleſiaſtical matters. And the Warrant of the Commit-

ment of the Commiſsioners, was to retein him, and until we ſhall give Order for his delivery. By the Court the cauſe is not traverſable. Becauſe there is no perſon in Court to take iſſue upon that. But the party is put to his action upon the caſe if the return of the cauſe be falſe, or may have a falſe impriſonment. 9 H. 6. 44. 10 H. 7. 17. b.

2. Until we, that is all we, 12 E. 4. 3. a. 1 H. 7. 7. a. that is not good: For if then any of them dyes or be removed: The party ſhall never be delivered by that means. But it ought to be, until he ſhall be lawfully delivered. But notwithſtanding, Wharton was not out upon bayl, becauſe now alſo he refuſed to take that oath: But with a ſo far forth as the Articles doe agree with the Law of God and the Land. Note, that ſuch ſubſcription or conſent to the Articles 13 Eliz. by a Parſon is not good. As it was adjudg'd in 33 and 34 Eliz. B. R. Clark *againſt* Smithfield. But afterwards Wharton was delivered by the High Commiſsioners.

Pinſon *againſt* Readhead.

P. Brought debt for 11 l. 5 s. and declares that he was Herauld of Chester by ſeveral Letters Patents, with the fees and profits, And that 11 l. 5 s. belong'd to him for his ſhare of fees, of a Knight lately made, and that the Defendant was Collector of the ſaid Fees, and had made a bill of that 11 l. 5 s. to the Plaintiff, upon which he now declared. And the queſtion upon the evidence was, P. was a compleat Officer by the very Letters Patents, without the Ceremony of the inveſture, and allowance of the ſix Commiſsioners of the Marſhal Court, according to their rules and Commiſsion, in which there is a clauſe; That none ſhall be Herauld, if he hath not been before a purſevant. Cook delivered his and the opinion of the whole Court, That he was a good Officer by the Letters Patents, and vouch'd one Dethicks Caſe, who was indicted by the name and addition of Garter King of Armes, And yet he had only the Letters Patents, without Ceremony. Alſo a Nobleman is compleat by his Patent of Creation, without the ceremonies of the Robes, or to be gladio cinctus, as it was Anthony Brownes caſe a Juſtice; who being queſtioned in the Upper Bench of Parliament, for being ſo without being a Gent. He pluckt out his Patent of his creation as Baron out of his boſome. And that was allowed him. One is a Judge by Letters Patents, although he be not ſworn, or hath not ſat upon the Bench in Court: And Clarentius now a Herauld, never was a Purſevant. And the Jury found accordingly.

NOte, if two recover in debt, &c. And before Execution one of them dies, If Execution be ſued in both their names it is not Errour. Brownlowe ſaid, that in ſuch a caſe, the ſurvivor ought to ſue a ſcire fac. before that he can ſue Execution. But Cook, and all the Court ſaid, That he may ſue execution without a ſcire fac. becauſe he is privy and party to the Judgement; And vouch'd 21 E. 3. [illegible]

NOte, that divers Outlawries were revers'd that term; Becauſe upon the return and proclamations, It appears that ſome proclamations were made in the time of the former Sheriff, and others in the time of the now Sheriff, and his name to them. But does not return, iſtud breve mihi deliberat. fuit de Recordo Of the proceedings of the former Sheriff.

Smiths

Smiths Caſe.

AN action upon the caſe for words, thou haſt had the French pox. And upon iſſue not guilty, it is found for the Plaintiff. It was now moved in arreſt of Judgement, Becauſe the words are in the preterperfect tenſe, and the party it may be now is well, and ſound, and no ſcandal. To which all the Court agreed, and Judgement arreſted. Cooke chief Juſtice took this difference of ſuch a ſlander, de tempore præterito, when it touches the mind, and when it touches the body. If it be a ſcandal to the mind, and the affections, as periury, felony, &c. there the mind that remains is ſlandered. But if it be of an accidental infirmity, or diſeaſe of the body, otherwiſe it is. For none now will forbear his company, although he had the plague in times paſt.

Parſon Latters *againſt* Suſſex.

T. & M. Iac. C. B.

HE was convented before the High Commiſsioners, and they would put him to his oath touching Simony (ſuppoſing it to be committed by him.) And a prohibition was granted, That none ſhall be compelled to accuſe himſelf upon his oath; where he is to incurre a temporal puniſhment, at the Common law, or a temporal loſſe, as in that caſe of his Church: ſo for Uſury. Note Dyer 175. in the Margin. And Cooke chief Juſtice, voucht 10 Eliz. Smithes caſe, an Atturney of that Court. The High Commiſsioners would put him to his oath, for hearing of Maſs. And a prohibition was granted: For by that he is to loſe 100 l. by the Statute, and a prohibition was now granted by the Court.

The King *againſt* the Biſhop of Litchfield, &c.

THe King brought a Quare impedit againſt the Biſhop, Smith Incumbent, and Langford the Incumbent. Plead no patron was named in the writ. And by the Court, that is a good plea in barre, although the King be Plaintiff, claiming to preſent by lapſe for Simony. Alſo the patron now, was only grantée of the prochein avoydance, and had preſented Smith, yet he ought to be named; but if the Clerk had been in by collation by the Ordinary for lapſe, or proviſion of the Pope in former times, or ex preſentatione Regis, againſt whom no writ lies. If a common perſon had been plaintiff in the quare impedit. In thoſe caſes it might be without any patron, ve. 7 H. 4. 37. 7 Rep. 26. 9 H. 6. &c.

Symonds *againſt* Cockerill.

VPon a Demurrer, in a replevin for 20 l. and an Avowry, &c. the plaintiff pleads in barre, that the Defendant had not given 100 l. and for that he granted to him 20 l. per annum for 8 years annually, as a rent-charge, and after that for two years more, if 3 men live ſo long, and concludes, that it was a corrupt deed. And this difference was agreed by the Court. If the Original contract, was for to have a rent-charge, as in our caſe, that is not Uſury but a good bargain and pennyworth; but if the party had come for to borrow the money, and then ſuch a contract enſued by ſecurity, then that is Uſury; but the party there alſo ought to plead that, quod fuit per viam corruptæ barganiæ. See 5 Rep. 69.

And it is not ſufficient to conclude that it was corrupt, although that by the Demurrer only it be confeſt. And now the Court mediated an agreement, to take the principal. And ſo it was concluded.

Allin *againſt* Naſh.

Intr. H. 5. Jac. C. B. rot. 208.

IN an Ejectione firm. it was reſolv'd, that if a Copyholder ſurrenders according to the cuſtom to the uſe of N. after the death of the ſurrenderer; that that is good notwithſtanding that one cannot preſerve the ſame Eſtate to himſelf; for the Eſtate is in the Lord. And the ſurrenderer during his life ſhall take the profits, and afterwards the Lord ought to admit B. according to the direction of the ſaid ſurrender.

2. Although that after the death of the Surrenderer, the Lord admits an Eſtranger, who leaſes to the Plaintiff, and the Defendant, who had right to enter without admittance, enters. He is not guilty as to the ſtranger, Becauſe his Entry is lawfull, and the admiſſion of the ſtranger was void. And Cooke chief Juſtice vouch't a caſe, There are two Copyholders, and the one ſurrenders to the uſe of his will, and makes his will, &c. and dyes. And adjudg'd there ſhall be no Survivorſhip. And Judgement was given accordingly in the principal caſe.

Atkins *againſt* Gage.

Huntingdon ſſ.

A Writ of deceit, upon Recovery in Dower, for default of ſummons was abated.

1 Becauſe Edward Cooke, &c. dated apud Caſtrum Norwici. Now where it was a judicial writ, it ought to have been dated there where the Common Bench is.

2. Reſolved by the Court clearly, although that the words of the writ of deceit are, Interim terram illam in manus noſtras, capias, ita quod neuter eorum manum apponat, &c. Yet the Sheriff cannot remove the party out of poſſeſsion; but he ought only to make a general ſeizure. See Bracton 365.

3. That the Summoners that appear to be examined, ſhall not have any charges, by the courſe of the Court. But the Plaintiff at his peril ought to procure them, and to bear their charges.

Rocheſter *againſt* Porter,

UPon a ſurmiſe to have a prohibition after ſentence, at the Spiritual Court two Judgements were vouch't, upon the Statute 2 E. 6. for not ſetting forth of tithes. And 43 Eliz. B. R. A pariſhioner privately ſets forth his tithes, and takes witneſs of it, and immediately after he carries them away; that is not a ſetting forth within the Statute. For the words are truly, juſtly, and without fraud or covin. ve. 10. H. 4. 2.

2. 44 Eliz. B. R. Bakers caſe. A pariſhioner ſells his grain upon his land, and after, by command of the Vendee, he takes his corn, being ſevered, without ſetting forth of the tithes. That the Parſon may well have an action againſt him upon the Statute, and ſhall not be compelled to ſue the vendee, who it may be was not known to him. And it is not traverſable, if the tithes were ſet forth according to 47 Eliz. It was reſolved in T. 7. Iac. B. R. Brickendine againſt Denwood.

Sir

Sir Walter Sands *againſt* Adams and Curwin.

THe caſe was thus. A. leaſes to B for 53 years rendring 10 l. rent, &c. B. dies inteſtate during the years. The Leſſor himſelf enters and enfeoffs one Goddard, who leaſes to I. S. for 21 years. Sir William Sands takes Letters of Adminiſtration to B. and enters, &c. The Defendants as Bayliffs to G. diſtrained for rent of a year. But that caſe was not then adjudg'd. But they cited many caſes. As Plou. 433. and 6 Rep. 5, 6. & 69. *Mich. 3. Jac. C. B. rot. 519.*

NOte upon motion to have a prohibition to the Counſell of York. Walmſly ſeem'd, That no prohibition may be originally granted out of the Common Bench, unleſſe there be a plea there depending for the ſame thing, and not upon a bare ſurmiſe. ve. Regiſt. 34. N. B. 43. 1. 2 E. 4. 11. Except in caſe de modo decimandi, becauſe the Spiritual Court will not allow that. ve. 22 E. 4. 20.

NOte in debt upon an Obligation by Cook ch. Juſt. And that ſo was the opinion of the Civilians, that a diſagreement to the Marriage had under the age of conſent. At the age it ought to be publiſhed in Court. Otherwiſe the iſſue may be baſtarded. For a diſagreement in writting is not a ſufficient diſagreement, nor a good proof.

Fitch *againſt* Vaughan.

IN an Ejectione firm. the caſe was thus. V. leaſes Bl. acre to A. for 10 years, rendring a rent, &c. And afterwards leaſes Wh. acre, and the rent and reverſion of Bl. acre to F. by demiſe, grant, and to farm let for 99 years: Habend. Wh. acre, the reverſion of Bl. acre, the rent and premiſes for 99 years rendring rent, &c. A. never atturns, the 20 year expire, and F. enters in Bl. acre; And by the Court well, For that ſhall enure as a leaſe. By the words demiſe, &c. Cook ch. Juſtice put this caſe, A. leaſes to B. for 10 years. And after he demiſes and grants that land to C. for 20 years. That is a good leaſe for 10 years preſently. But if B. happen to have atturnment, then he ſhall have the reverſion preſently. And thoſe two eſtates ſhall be in him, and ſtand divided.

The Prebend of Hatcherlies Caſe.

THe Deanry of Wolverhampton annex'd to the Deanry of Windſor, being peculiar, and having ordinary Juriſdiction, The Dean makes a Commiſſary by his deed, which is confirm'd by the Chapter. The Dean dies. The queſtion was, if that was good to bind the Succeſſor. By Doderidge that ſuch a Juriſdiction is Judicial, and that grant is but a Commiſſion and Authority, all times remaining in the Ordinary. True it is, That Eccleſiaſtical Juriſdiction in judicial acts may be executed by ſubſtitute. But in law, they are the acts of them who ſubſtitutes the other. ve. 11 H. 4. 64. a. 7 E. 4. 14. 20 H. 6. 1. That a Commiſſary may excommenge and prove a Teſtament: But that ſhall be made in the name of an Ordinary. 20 E. 3. And a grant of that by the Biſhop is not good, but during his life; And ſhall not bind the ſucceſſor: For the law hath appointed, that he ſhall exerciſe that Juriſdiction (ſede vacante) (ſi licet) the Archbiſhops in their ſeveral Provinces. ve. 17 E. 3. 23. That the Archbiſhop and the Dean and Chapter cannot grant the Juriſ-

diction of the Warden of the Spiritualties, after the death of the Archbiſhop, which is a more ſtrong caſe. And if the Subſtitute as abovelaid offends, the Ordinary ſhall be puniſh'd for it. Which is unreaſonable: So that the grant being void, that cannot be made good by the confirmation of the Chapter. Cook ch. Juſt. If that ſhould be a good grant to bind the Succeſſor: Then the Succeſſor cannot remove him. And yet the Succeſſor ſhall anſwer for the acts and offences of the Commiſſary, which would be too hard.

Intr. P. 19 Iac. IN the Star chamber between the King ex relatione of the Deputy of Ireland, and the Lord Deſmond, Sir Percy Cresby and other Defendants it was reſolv'd.

1. That if there be divers Defendantr, and one of them does not accuſe himſelf, but accuſes his Companion another Defendant, he ſhall not be receiv'd as a competent teſtimony to condemn his Companion, but if he had accus'd himſelf, then he ſhould have been received as a competent teſtimony to condemn his Companion.

2. If there be divers Defendants in the Star-chamber, and one of them is examined upon interrogatories for the King. None of the other Defendants ſhall take advantage, nor ſhall bind any part of his teſtimony, which was not bound for the King; For it was their folly that they had not examined him upon their own interrogatories: But every Defendant may take advantage of every thing that any teſtimony hath depos'd. Although that the King hath not bound his depoſition for himſelf, If he be not a Defendant ut antea &c.

3. That if a Privy Counſellor be to be examined in the Star-chamber. If the Privy Counſellor ſaid, that the Defendant related that to him, as a Privy Counſellor, and not otherwiſe. The Counſellor is not bound to render more over to any thing then the Defendant hath related to him.

The Widow Dolbins Caſe.

A. For debt extended the lands to B. D. to extend the lands of B. for his own debt, and to have the lands out of the hands of A. (by Recogniſance) acknowledges himſelf to be indebted to the Kings Auditors. For which debt of D. the lands of B. were extended and taken out of the hands of A. for abuſing the prerogative of the King. In that D. was cenſured in the Star-Chamber.

Evers *againſt* Teynton.

A. ſeis'd of lands, acknowledges a Recogniſance to B. in the Chancery, And afterwards ſells the lands to C. and dies. B. ſued a ſcire fac. againſt C. terretenant and the heir of A. To which C. pleads that A. was not ſeis'd of the lands at the time of the acknowledgement of the Recogniſance. And it was found by the Jury for the Plaintiff, Upon which C. moves to arreſt Judgement. For that, that the Sheriff had return'd the terretenant only, and not the heir. Upon which Judgement was ſtaid untill the Sheriff had made an alias return; And return'd the heir as well as the terretenant. And then Judgement was given for the Plaintiff. The Plaintiff himſelf ſhew'd the very caſe to me.

Banniſter

Baniſters Caſe.

BAniſter was indicted and found guilty by the Jury of Common barretry in Denbigh, and he brought Errour in the Kings Bench. And in the Record in Denbigh it was entred ideo venit inde iurata, And no venire fac. nor præcipe to ſummon them was entred upon the Roll. And that was the exception. for it was agreed by the Court, That in Superiour Courts, as at Weſtminſter, The Entry is Ideo venit inde iurat. But in Inferiour Courts, as now the uſe is, to recite the venire fac. or præcipe. But the Court gave a day to ſhew Preſidents of the Entry. Ideo venit inde jurat. *Tr. 15. Car. B. R.*

NOte, Executors ought to pay debts upon Judgements, before debts upon ſpecialties. 7 E. 6. Dyer 80. 21 E. 4. 21.

A Indictment for a forcible entry. And becauſe it was ſaid expulſatus, where it ſhould have been expulſus, and fortiori modo, where it ſhould haue been forti modo. The party was diſcharg'd.

NOte, it was ſaid by the Court, That a Covenant to pay money ſhall be forfeited to the King by Attainder of felony. And ſo it was adjudg'd in the Caſe of George Norice.

Barcham *againſt* Netherſale.

AN action upon the caſe was brought for ſaying, B. is a bad minded man, and none but he did burn my Fathers barn, and he doth uſe to ſet fier of barnes about Michaelmas, when they are full of Corn. Hadd. That an action is not maintainable, becauſe it is not furmis'd that there were barns burn'd about Michaelmas. Alſo it is not ſhewn that they were near a dwelling houſe. Yet adjudg'd for the Plaintiff.

The Lord Comptons Caſe.

VPon the Statute of Wincheſter, for robbing of his ſervant in the Hundred of Ogden: Upon evidence to the Jury at Bar, It was reſolv'd by the Court, *Roleys Upon the Stat. of Winc.*

1. That the party rob'd ought to give convenient notice ſo ſoon as he can.

2. If any other aske him what he ayles, and he ſays that he was robbed, that is good notice.

3. If the Hundred of A. and B. are adjoyning, and the robbery is done in the utmoſt confines of A. and the party not knowing the Hundreds goes to B. There gives notice, that is ſufficient, becauſe he is an Stranger, and they ought to make hue and cry, Eaſt, Weſt, North and South. And ſo the Hundred of A. ſhall know it.

4. If a man be rob'd in an Hundred, and after the Hundredor ſells or leaſes his land; The Purchaſor or the Leſſee ſhall be charg'd. For the land it ſelf is for that charg'd.

5. If the party robbed, knows the Robber, now he ſhall be bound in a Recogniſance to proſecute the Robber; but yet he ſhall have his action againſt the Hundred, if he be not taken.

6. The party robbed is not bound to lend his horſe, to purſue the thief

thief, nor he himſelf is bound to goe and purſue the thief preſently.

T. 4. Car. B. R. IN a replevin the Sheriff does not return any pledges; and after iſſue joyn'd, and found, it was moved, If they can be put in by the Court after verdict. And by the Court, that they may, notwithſtanding the Statute of W. 2. cap. 2. For before that Statute, the Court might take pledges upon the omiſsions of the Sheriff. But that diverſity was agreed, between

1. Pledges of proſecuting: and thoſe may be inſerted at any time after, and then the Sheriff cannot be puniſht, 3 H. 6. 3.

2. As well of proſecuting, as return. habend. as now and there by the Common Law. Alſo the Court may take pledges for default of the Sheriff. But then the Sheriff ſhall be only amerc'd. But now by that ſtatute, a penalty is likewiſe given againſt the Sheriff: But that ſtatute does not take away the power of the Court, to take pledges for default of the Sheriff; For if the Sheriff omit that, and the Court takes pledges, yet the party ſhall have his action againſt the Sheriff, upon that ſtatute. And for that, the taking of pledges now by the Court, will not make the Judgement erroneous.

The Grand Caſe of the Habeas Corpus.

THe Priby Counſel directed an Order to the Mayor of London, to apprehend certain Citizens of London, and to make them appear before the Lords of the Priby Counſel to anſwer all ſuch matters as ſhould be objected againſt them. And the Mayor took them and impriſoned them, becauſe they would not enter into Recogniſance. And the priſoners ſue an Habeas Corpus in the Kings bench. And the Mayor returns, Quod virtute cujuſdam Ordinis ad illum direct. à Dominis privati Concilii, and does not recite the particulars of the Order. He impriſoned them, becauſe they would not enter into a Recogniſance, &c. as above ſaid; and exception was taken to that return, by Peard, Maynard, Keely, Holborne, and St. John.

1 It is ſaid to be virtute cujuſdam Ordinis, and does not recite the particulars of the Order, and that is ill,

1. Becauſe the Order remains with the Mayor, and he is conuſant of it.

2. That is of the Eſſence of the return; and therefore in Baggs's caſe, all the warrants were returned in hæc verba.

3. Otherwiſe all that is for the priſoners in the Order ſhall be amiſt, and all that ſhall be againſt them, ſhall or may be included, and ſo a grand inconvenience ſhall enſue.

2 Exception. The Mayor ought to ſhew, for what cauſe there ought to be Recogniſance entred into. Which he hath not done; Therefore naught.

1. That a Recogniſance is a reſtriction to his liberty: ſo that he ought allwayes to attend for ſaving his Recogniſance; and if it ſhall be broken, his lands are chargeable.

2. A Recogniſance is a Judicial act upon record, and for that the Judge ought to have ſome internal cauſe to move him to take that Recogniſance; and if he ought to know the cauſe, then he may make it known to the Court.

3. The cauſe ought to be known to the Mayor, for then hee may make it known to the Court over. For if the King intruſts him to be a Juſtice of Oyer and Terminer, which is a thing of great conſequence; then

then the Privy Counſel may intruſt him with a leſſer matter; as in our caſe. And for that, it is not like a warrant made to a Conſtable, or a warrant or command made by the Juſtices at Weſtminſter to a Tipſtaff. For there it would be inconvenient to reveal the cauſe to ſuch petty Officers. But now the Mayor is a great Judge (as tis ſaid) and ſo no inconvenience.

4. A grand inconvenience ſhould enſue if other wiſe. For if that warrant of the Privy Counſel, was directed to take a man at remote parts of the realm, as Carliſle. He ought firſt to come to London to know the cauſe, and after returns for his witneſſes or evidences to clear and diſcharge himſelf; and ſo he ſhall make two Journeys, where one would have ſerv'd, if he had known the cauſe at firſt.

5. Perhaps, the Privy Counſel attatcht him to appear and anſwer to a thing, of which they have not Juriſdiction, and for that the cauſe ought to be return'd: ſo that the Court now may judge, if they have Juriſdiction or not. And for that it was reſolv'd in that Court, upon an Habeas corpus returned, That if the High Commiſſioners fine, and impriſon for that fine, and the priſoner ſues an Habeas corpus; it is not ſufficient to return, That he was fined, and for the ſaid Fine was impriſoned. But he ought to ſhew preciſely the cauſe for which the Court impoſed that fine. For it is a rule, that alwayes where the Court hath but a limited Juriſdiction, there upon the Habeas corpus, the cauſe ought to be certified; for perchance it is out of their Juriſdiction; upon which the Court ought to adjudge. So now that Court ſhall be judge, if the return of the Order and all the cauſe be inſufficient or not.

3 Exception. For that, that it is to enter into a Recogniſance, and they have not power to compell them to enter into Recogniſance; For it is, that the Counſel may apprehend them, but not compell them, for to enter into Recogniſance, and for that no inconvenience may enſue to the Counſel; for they may attach him to appear. But if they ſhall compell the party to enter into Recognizance, a grand inconvenience ſhould enſue to the party. But if he enters or not enters, the miſchief ſhall be great to him. For firſt, If he will not enter, then he ſhall be detained in priſon, until he will enter. And of the other ſide, If he does enter into a Recogniſance, then he hath no remedy to annull that Recogniſance. But it ſhall be good againſt him for ever.

1 A Recogniſance is a Judicial act, and the Counſel cannot give authority to them to take a Recogniſance.

3. Every Recogniſance is either

1. Voluntary; and this is not ſo.

2. Compulſory; and that cannot be, but for a crime committed. But now no crime appears to be committed. But it may be objected, That upon a ſupplicavit in Chancery, the Sheriff or Juſtice of Peace may take a Recogniſance, to keep the peace. So upon a ne exeas Regnum. To that it was anſwered, That the Sheriff or a Juſtice of Peace have power to take a Recogniſance. But the Mayor now hath not juriſdiction. For the Counſel cannot give it to him.

Harbin *againſt* Loby.

IN an Ejectione firm. upon not guilty pleaded, the Jury gave a ſpecial verdict. A. and B. joyntenants for life. A. makes a Leaſe for 99. years to commence after his death, if B. ſhall ſo long live. B. ſurrenders to the Leſſor during the life of B. And it was reſolv'd and adjudg'd by 3 Juſtices: But Fenner againſt them. That the leaſe is void by the death of A. and 2 points were mov'd.

1. If that leaſe was good in point of Creation (viz.) if two Joyntenants are, and the one makes a leaſe to commence after his death, and then dies, and all ſurvives to the other. And agreed by the whole Court that it was.

2. If A. and B. Jointenants. A. makes a leaſe for 99 years, and then B. ſurrenders, or makes partition; and then A. dies: Yet the leſſee ſhall return the part of A. during the life of B. And it was objected, that ſo, becauſe the land was bound by the leaſe; and if he had ſurvived, then it is clear, that the Leſſee ſhall retain. But now it does not lie in the power of the Leſſor or his Companion to defeat that, that was once executed. But it was anſwered and adjudged, That now by the death of A. the leaſe is become void. For firſt the Leſſee had not but a poſsibility to have it during the life of B. which is now deſtroyed by the ſeverance of the Joynture.

3. In that caſe B. was the cauſe of the ſeverance of the Joynture, and not A. But it would have been all one, if A. or B. deſtroy'd the Joynture; For the Leſſee ſhall not have that abſolutely during their two lives, but upon a contingency and a poſsibility, that the joynture continues. But now it is deſtroyed, and with that the leaſe. And in that caſe, this caſe was put. Two joyntenants joyn in a leaſe for years to two; And afterwards they make partition, and the one dies. Yet the term continues for all.

Courtney *againſt* Thompſon.

AN action upon the caſe was brought for words. Thou art a Bankrupt. And in the Declaration they ſet out, that he was a tradeſman that dealt by retayl, and no Merchant, and Judgement for the Plaintiff. And it was mov'd in arreſt of judgement, becauſe they do not ſet out in their Declaration, that he was a Merchant, but one that ſold wool, which is not within the Statute. But the Court ſaid, that that was all one, and no difference, but the Statute extends to ſuch a Tradeſman, as well as the word Merchant. And ſo judgement was affirm'd.

The King *againſt* Boreſton and Adams.

In Exchequer. AN information of Intruſion was exhibited pro Dom. Reg. againſt Boreſton and Adams for entry in Aldon woods in the County of Worceſter, who entred as ſervants to the Counteſſe of Warwick. And the point of the caſe was thus. William Hobby had iſſue, Philip Hobby his ſon, and Mary his Daughter. Philip purchaſes land to him and his heirs in fee. Willam Hobb the father was attainted of treaſon, and Philip dies without iſſue. The queſtion was, if Mary be inheritable to Philip or not, by reaſon of the corruption of blood in the Common Anceſtor. And that term the caſe was argued before the Barons of the Exchequer, by Stephens, who argued for the Counteſſe, and that ſhe may well inherit, he ſaid, That the circumſtances to be conſidered in this caſe are,

1. That a diſcent between Brethren requires intirety of blood: And the eldeſt ſon is not heir becauſe he is more near of blood; but becauſe he is more worthy. But in other deſcents, the more near of blood ſhall be preferr'd, as to the Uncles or Coſins. Alſo the Brother in making of his deſcent, ſhall not make mention of the Father, nor ſhew as he is Brother; as Coſen ſhall make. As appears. 40 E. 3. And Britton ſaid expreſly. That the eldeſt does not inherit, Ergo he is more old, or near of blood: But for that, that is more worthy. And Green ſaid ſo, For he ſaid, The Daughter is as near to the Father as the Son. So that the At-

Attainder of the Father, ſhall be a diſablement for all heirs to claim by deſcent, where the deſcent is made by him. 17 E. 4. 1 20 H. 6. 43. The Uncle of the part of the Mother, ſhall not have an appeal of the death of the Son of the Mother; for he ought to convey by the Mother, and ought to make mention of her. But where an immediate conveyance may be made, without mention of him that is diſabled, it is contrary. Littleton ſaid, That if lands be given to a man and the heirs males of his body: If he hath iſſue a Daughter, who hath iſſue a Son, that Son cannot inherit, for he cannot convey by an heir male, but he ought to name the Daughter in the Conveyance, and that deſtroys his title. But if it had not been requiſite to have nam'd the Daughter, the Son might inherit. If a Son hath iſſue a Son, who purchaſes lands, the Mother of the Son is attainted, and he dies without iſſue, the Uncle of the part of the Father ſhall inherit, for he does not convey nor makes a deſcent by the Mother. So if the iſſue of a Baſtard purchaſe lands, & dies without iſſue; although that land cannot deſcend to any heir of the part of the Father, yet the heir of the part of the Mother may: ſo if the Baſtard was attainted. For the heirs of the part of the Mother makes not any conveyance by the Baſtard. Littleton ſaid, that by the Attainder of the Father, the blood is corrupted between him and [illegible] which are his heirs. By which it may be collected, That if they are not to make them heirs by him, that between them the blood is not corrupted, But there was objections raiſed out of Stanford: For he ſaid, that by the Attainder of the Father, the heirs are diſabled to make a deſcent from any Anceſtor: But that is to be intended from thoſe of whom he ought to claim by the Father: For otherwiſe by the Attainder of the Father the heir ſhould not inherit the Mother. And Bracton ſays expreſly, That notwithſtanding the Mother be attainted, yet the ſon might inherit the Father. 12 H. 7. There it is, that if a man hath iſſue by his Wife, the Husband is attainted and pardoned, if he hath iſſue another Son, he ſhall be Tenant by the curteſie. Stanford yet ſays, That by the Attainder of a Nobleman his heirs ſhall be ignoble. But that is to be intended of the Nobility that deſcends from the perſon attainted. If an Alien hath iſſue two Sons, the eldeſt purchaſes lands, and dies without iſſue, the youngeſt ſhall inherit; And yet there is not any privity of blood in them to inherit the Father, as a Common Anceſtor.

An other Objection was made, for that that the Father is their Fountain, and if it be corrupt, all the branches and ſtreams muſt of neceſsity be corrupt, that is, when the Father is the Conduit, and they are to derive their eſtate from him: But theſe do not claim ſo. And to make a privity in their blood, the Mother ſuffices. An other Objection was made upon that; the Fathers blood is more worthy, ſo that his diſability deſtroys all: But that is not ſo. For the blood of the Son is indifferently participant of both. 12 E. 4. If a Purchaſor hath iſſue, who dyes without iſſue, that land ſhall go to the heir of the part of the Mother of the Purchaſer; If their be no heir of the part of the Father. And 5 H. 7. Colts caſe. If land be given to Baron and feme. and the heirs of their two bodies, the Husband being attainted dies, The iſſue ſhall not inherit. But now in our caſe it is not ſo; for he is not to make a conveyance by the Father: And conſequently his Attainder ſhall not diſable him to inherit. Fleminge the Queens Solliciter argued on the contrary. The Queſtion is now, Whether Mary ſhall be heir to her Brother Sir Philip, the Father being attainted of Felony, And he ſaid, that the Attainder did diſable the Siſter to be heir to her Brother. In the Argument of the Caſe two general points were to be conſidered.

1. The courſe of deſcents.
2. Attainders and their effects.

1. For deſcents, There can be no deſcents, without an Inheritance to deſcend, and a perſon upon whom it may deſcend: And the perſon upon whom it doth deſcend is called Hæres, ab hæreditate. And this perſon is not made heir by any act or diſpoſition of the owner. For he dyeth, and leaveth it indiſpos'd; but it is ſetled by the courſe of the Law. The Law doth not caſt or ſettle an Inheritance upon any perſon, at adventure; but by a ſure and ſetled courſe, founded and grounded upon reaſon. Let us then examine the reaſon, Why the Law doth ſettle the deſcent by Inheritance upon one perſon more than upon another, and wherefore one perſon is preferr'd in courſe of deſcent, before another? The reaſon of our Law therein, is grounded upon the Law of Nature, and the Law of God, to provide, love, preſerve and advance the ſame perſon, the Law will preferre and advance, executing that which the owner by all intendment would or ſhould in his life-time have done. But by Nature and Gods Law, every man is bound to love, preferr, and advance his own blood before any ſtranger. Therefore the Law following Nature and Reaſon, will advance him to be heir; that is, of the blood of the owner; for where there is no derivation of blood, from or betwixt the owner, and him that ſhall ſucceed as heir, there the Law will not advance or preferre him to be heir. And as every one of blood by poſsibility may inherit, ſo all of blood cannot inherit ſimul, but there is a preferment of one of the blood before another, in the next of blood, before one more remote. And if in equal degree, then the worthieſt. And to diſcern who are of blood, who near, who remote, we muſt reſort to a Line mentioned both in our Law, the Civil Law, and the Law of God, which Line is a collection deſcending or deriving from one common ſtock, containing certain degrees, by which it may eaſily be diſcerned, what diſtance and degree there is between perſons linked and coupled in blood, the one from the other, and they are called degrees, ad ſimilitudinem graduum, per quos gradimur à primo ad proximum; and this Line is either recta or tranſverſ. and theſe other, aſcendent or deſcendent, and thoſe in linea recta deſcendente are always preferred before thoſe in linea tranſverſali, and in both lines the deſcendents are preferr'd before the aſcendents from the common ſtock, quia hæreditas eſt quoddam ponderoſum cadens, as Bracton ſaith, And hereby it is very evident, and cannot be denyed, whatſoever perſon is not comprehended within this line of conſanguinity, that perſon cannot be heir by any means; for the Law reſpects no man that is not of blood, becauſe of the line of blood and conſanguinity. The Law cannot ground it ſelf upon ſuch a ſound and certain rule, as is the Law of Nature; and therefore our Law doth yield many tollerations, between thoſe perſons that are united in blood, which it doth not tollerate in ſtrangers, viz. one brother cannot have an aſsize of Mordt. againſt an other, no deſcent in the youngeſt ſhall take away the entry of the eldeſt, where the warranty is collateral, it is a barr only in preſumption, that the one will not hurt the other. Between them no wager of Battail: So that the Law preſumeth ſuch Love between thoſe that deſcend from one and the ſame parentage, that ſhe intendeth that the one will not wrong the other, the one will revenge the loſſe of the other; and where there is ſuch Love to revenge, and not to wrong, there muſt alſo be a love to preferr and advance before all other. And becauſe this love between thoſe that are of blood & conſanguinity, is the bond of nature, the ſureſt & the greateſt, therfore God to enlarge & ſpread this love in the world, did prohibit marriage within certain degrees of conſanguinity. Hereof I thus conclude, that for as much as the law in courſe of deſcent will admit no man to be heir, but ſuch

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as the owner by nature, and the Law of God was bound to love, preſer, and advance, and that is that perſon that is neareſt coupled unto him in bloud, whom nature it ſelf doth invite to love: therefore, where there is not this natural love proceeding from bloud and conſanguinity, there is no advancement, no deſcent: ſo that the efficient and effectual cauſe of deſcents is proximity of bloud.

And touching Attainders, and their operations and effects. Stamf. ſaith, and common experience ſheweth, that in penal judgement of treaſon or felony, there is no mention made, that the offender ſhall forfeit his lands or goods; that his wife ſhall loſe her dower, or that his bloud or linage ſhall be corrupted. But the ſame in every judgement is implied. But wherefore ſhall his wife loſe her dower, or his bloud be corrupted, and his children and kinſmen be diſabled? they are not offendors. Litt. and Stamf. give theſe reaſons, grounded upon the Law of Nature alſo: viz. Men will more eſchew thoſe capital crimes, when they ſhall ſee thoſe perſons who in nature are neareſt and dearеſt unto them, and by Nature moſt to be beloved, ſhall be puniſhed with themſelves: So that if themſelves will not refrain from ſuch crimes for themſelves; yet they ſhould the rather refrain for the love of their wife, children, kinred, upon whom, through their faults, they bring ſo perpetual puniſhment and ſtain of ſo Infamous a note, as that their ſtock, bloud and linage ſhall be corrupted and attainted, and their children diſinherited. And hereby it is truly collected, that as in deſcents the effectual and efficient cauſe, is, the natural Love that is preſuppoſed to be between thoſe that are linked in bloud; by reaſon whereof the Law doth preſer and advance one man to be heir to an other: So alſo in attainders, for that the offenders do not refrain from committing theſe Capital offences, for the love of their wives, children and kinred, but unnaturally, as it were, to hate their own bloud; the Law doth alſo with them, abhorr their offences, and hate their bloud: ſo that it doth not think any perſon deſcending of that bloud, worthy of any advancement, but diſablement and exheredation; and our Law in both theſe points touching deſcents, and diſablement of deſcents by attainder, is grounded upon nature, and the Law of God, in the plea and judgement of the daughters of Zelophead, Numbers 27. 6. & 36. 2. Of which general reaſons I may thus inferre, If there be not a perſon from whom, as from a common ſtock, his bloud is derived to others, whereby they are with the bloud of the ſame bloud united, as deſcending from the unity of one and the ſame ſtock, there can be no heir to ſucceed: And on the other ſide, if that common ſtock be rotten and corrupted, that the ſucceeding from thence be as no bloud, becauſe it is corrupted; Then cannot any perſon be heir to an other, that is not united otherwiſe in bloud, but from and by this corrupted and attainted ſtock. From theſe general grounds, let us deſcend to particulars, and to no further degrees in blood, than between brother and brother, or ſiſter, as our caſe is. Is there any cauſe or reaſon to be given, why one brother ſhall be heir to an other, but this only, that they are born of the ſame parents, participating of one and the ſame blood, and deſcending from one and the ſame ſtock? The Civilians ſay, that Fratres aut ſorores proprie ſint conſanguinei, quia ex eadem parte prognati, et conſanguinitas, & ſanguinis unitas, à con & ſanguine, quia de communi ſanguine deſcendit; For one brother deriveth not bloud from an other. And therefore I make my firſt Argument out of Littleton, for the perſon who ſhall be heir in this caſe, whoſe words are, If a man purchaſe land, and die without iſſue, his next Cozin of the whole bloud of the part of the Father ſhall inherit. Then put our caſe, Sir Phil. Ho. purchaſed Alton woods, and is now dead, without iſſue of his body. Now by Littletons deſcription, that perſon muſt be heir, that is his next Cozin of the

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whole bloud of the part of the Father; Then if Mary Ho. be ſuch a perſon, ſhe muſt inherit; if not, ſhe cannot inherit. But you have pleaded William Hoby and Alice his wife had iſſue, the ſaid Sir Ph. and Mary, and ſo plainly Mary is the next Cozin of the whole bloud to Ph. on the part of the Father. And you have told us, that William her Father was attainted of felony, and then out of your pleading I thus anſwer you, It is true, that ſhe is ſiſter, and next Cozin on the part of her Father to her brother, natura, or ſecundum carnalem conſanguinitatem, but not Iure ſecundum jus conſanguinitatis; there is ſanguis naturalis, or ſanguis hæreditarius, or civilis, the naturel bloud can never be attainted, corrupted or taken away between them; but the Civil or hereditary may be. And herein the Civilians ſay truly with us, Conſanguinitas diminutione capitis non tollitur ſed jus conſanguinitatis tolli poteſt. Sir Ph. & Mary are brother and ſiſter in reſpect of the natural bloud. But Civili ratione et intellectualiter, they are not Cozins, the Father being attainted; nor of bloud to be heir one to the other: for as the Law would have judged them heirs one to another by their bloud, ſo long as the ſame bloud had remained hereditary bloud of the ſame hereditary bloud being taken away and corrupted by the Attainder is now in judgement of Law no bloud, and now the Law cannot judge them to be heirs by that bloud, which jure and civiliter is no bloud; for every corruption is as it were a privation, preſuppoſing a thing ought to have been, and now is not; and therefore though re et ſubjecto the bloud remain; yet jure and civiliter it is not: for what in Law hath no force nor vertue is truly ſaid not to be, as every void thing in Law is ſaid to be nothing. And therefore to prove this diſtinction of bloud, and attainted bloud is no bloud, theſe caſes following may ſatisfie. 1. An Alien hath iſſue two ſons, who are made Denizens, which purchaſe Land, and dieth without iſſue, his brother ſhall not be his heir; yet are they Cozins naturaliter, but not jure or hereditary. 2. A man marrieth a wife precontracted, they have iſſue two ſons; a divorce is had, one of them purchaſeth land and dieth without iſſue, th'other ſhall not be his heir, cauſa qua ſupra. 3. A man hath many Cozins, he is attainted and executed; the natural bloud remaineth, yet none of them ſhall inherit. The Law ſaith, the Land ſhall eſcheat for want of heir, et Perſaye 48 E. 3. 2. ſaith, The Lord may have his writ of Eſcheat, either that his Tenant was attaint, or that he died without heir, at his election. Therefore I conclude from Littleton, that Mary cannot be Cozin and next heir unto her brother Ph of the bloud of her Father, becauſe the Fathers bloud is no hereditary bloud, nor effectual, nor available to make them Cozins, jure et civiliter. There is between them conſanguinitas, but there is not jus conſanguinitatis; for that by the Attainder is taken away. A ſecond Argument I take from Stamf. from the conſequents and effects that follow Attainders, he ſaith, that the bloud and linage ſhall be corrupted by Attainder, and his children cannot be heir to him, nor any other anceſtor, and not only himſelf if he were noble, is become ignoble, but his children alſo, having regard to the nobility of their birth. I will not deal with the Science of Heraldry, I leave that to the Profeſſors thereof. Yet I hold it plain, that the arms which William Hoby the Father could bear, Ph. his ſon cannot bear. And what arms Sir Ph. by his own deſert did newly acquire, his brother a Cozin collateral by the Law of Heraldry cannot give or bear. But out of the generality of the words of Stamf. I frame this Argument. The children of a man that is attainted cannot inherit any Anceſtor. But one of them is anceſtor to another; therefore one cannot inherit the other. The firſt Propoſition conſiſteth of Stamf. own words, another to be reverenced, who in thoſe matters he in his book hath handled, hath very laboriouſly and judicially travailed

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travailed, and it is to be proved by reason; for resort to the Line which before I mentioned, and see whether there can be any Ancestor to the Children by the unity, or bond of any bloud; but that of necessity is derived from one and the same stock, that is the person attainted, you shall plainly perceive by the line that one of these Children cannot have any Ancestor, or be Cozins to any but by the bloud of the Father; and seeing that bloud is ineffectual to make them heirs or Cozins jure and hereditarie; therefore they can have no Ancestors. Now that one Brother is Ancestor to an other, no man will deny; therefore the conclusion standeth, one of them cannot be heir to the other. A 3 argument from Littleton, a fortiori, A man hath two Sons by several venters, one purchaseth, and dieth without issue, the other shall not be his heir, but the next of the whole blood of the part of the Father, that is the Uncle, viz. the Fathers brother; examine the reason why the Uncle shall be prefer'd: is not one of those brothers nearly lincked to the other, both of them immediatly participating the blood of the Father, then is the Uncle, between whom there is not immediate participating of blood but in degrees remote, viz. in the grandparents; but forasmuch as the Uncle and one of those Brothers do fetch there Cozinage from the unity of the whole blood, although by a remote stock, yet shall the Cozin of the whole blood inherit before the Brother of the half blood, because the whole blood is more forcible than the half: If then the half blood want force to make an heir, how can corrupted blood, which in the eye and Judgement of law is void blood, and as it were no blood, cause any man to be heir by no rule of reason wehre the Sons cannot be heir to the Father by reason of an impediment on the part of the Father, there cannot those Sons be heirs, the one Brother to the other; for if the blood descended from the father be not effectual to make the Son heir to the Father, the same blood by which Brothers are consanguinei cannot be available to make them heir one to another; if the blood cannot have hereditary operation in linea recta, it is impossible to have operation in linea transversali: as for example let the case be remembred which I put before, which as they are put no man will deny for law. An Alien hath two Sons, Aliens, they are made Denizens, the Father purchaseth and dyeth, none of these Sons shall inherit, even so if one of the Sons purchase and die without issue, the other shall not be his heir, the reason is, the bloud of the Father was not hereditary between him and his Son, and therefore cannot possibly be hereditary between the Brothers: And the same law do I hold, if the two Sons had been born in England, and no difference albeit by their birth they had been born Denizens, for their birth as brothers will not avail them, unlesse there be any hereditary blood also betwéen them, as the next case doth plainly prove. A man taketh a wife within the degrées prohibited, or precontracted, and hath issue two sons, and after a divorce is had, these sons cannot be heir to the Father, so can they not be heirs one to the other, yet were they at their births inheritable to their Father, and one of them to the other; but by matter ex post facto, that bloud that made them to be inheritable, is after made unable, and uneffectual to make them heirs, viz. son to be heir to the Father, and by consequence, the brother to the brother. By all which arguments grounded upon Littleton and Stamf. and upon the reasons of the Law in course of descents, I hope I have sufficiently proved that Mary Hobie cannot be heir to her brother Sir Ph. which shall more evidently appear by the resolutions and answers made to the Objections and Arguments of the contrary part. And first it is said of the contrary part, that descents betwéen brothers do differ from all other descents collateral, for that is an immediate descent the one brother to the other, and not from Father or Mother, and there-

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fore the one ſhall be heir to the other, without making mention of Father or Mother, or other collateral anceſtor, and where the Father or Mother or other Anceſtors attainted need not be mentioned, but by his omiſsion the deſcent may well be conveyed, there th' attainder of that perſon omitted cannot hinder the deſcent, but wherein the conveyance of a deſcent of a neceſsity mention'd muſt be made, there the attainder will hurt, and to prove their intent they vouch 17 E. 41. 20 H. 6. 43. 31 E. 3. bar. ult. 3 E. 2. 7 E. 3. 46 E. 3. 21. Eliz. I will firſt anſwer their reaſon, and after the caſes, that in form of pleading a deſcent between brothers, it ſufficeth to ſay that one brother is dead without iſſue, but that the other is his heir, without mentioning how they are brothers. I willingly grant, and it muſt alſo be granted, that if in pleading the Father and the Mother be mentioned, the pleading is not evil, for ſo you ſhall ſee it ſometimes allowed: in Cleer & Haddons caſe of the part of Yonger it is ſo pleaded, and no exception: And it was pleaded in our caſe; So then it is reaſon conſiſteth in formality of pleading, and not upon the ſubſtance of matter; but let us examine the reaſon why this form of pleading is allowed, and we ſhall eaſily perceive that it concerneth form and not matter. good pleading, ſaith Litt. is laudable and profitable; laudable for a pleader to ſet forth to the Judge certainly and briefly, without ſuperfluitie fruſtra fit per plura quod fieri poteſt per pauciora: profitable to plead all that which may profit his Clyents cauſe, and to leave unpleaded that which is not for his profit, whereof cometh this rule, that no man is bound to ſhew matter againſt himſelf: if a man in pleading will intitle himſelf, as cozin and heir to his Anceſtor, he muſt alſo ſhew how Cozin, or otherwiſe, his plea is uncertain; For whether he be Cozin in the firſt, ſecond, or third degree non conſtat, and there may be many between them and the anceſtors; beſide the ſhewing how Cozin, doth offer certain matter to the adverſe party to anſwer the Cozinage: The ſame reaſon is, if a man intitle himſelf proximus ſanguine upon the Statute of 6 R. 2. of raviſhment, he muſt ſhew how proximus, although he be brother, becauſe proximus is too general, and hath no certainty in this caſe. If one will plead he holdeth in Copercenary, with an other, he muſt ſhew how, for beſides ſiſters there can be others that may hold in Copercenary, in degrees more remote; And therefore when the pleading doth contain ſuch words of generalty, there muſt that be ſhewed in certainty. But when a man intitleth himſelf as brother, that is ſo certain as none can come between them, as there may when he is pleaded Cozin and heir, and therefore between brothers need not for certainty and brevity, that their Father and Mother had iſſue between them theſe two brothers, for in ſaying they are brothers all this is certainly intended prima facie, and therefore to plead at large that is included in few words were but ſurpluſage, and ſo having certainty and brevity in this manner of pleading, it is formall, and good; but if it be otherwiſe pleaded, as in our caſe it is pleaded, That William Hobby and Alice his wife had iſſue Philip and Mary, and then ſhew the Attainder of the Father; his pleading is alſo good, for where the matter is plainly ſet forth, the pleading is not evil, and albeit the Defendants were not compellable to ſet forth the attainder in their plea, becauſe it is matter againſt themſelves, yet who doubt th but that the plea touching the form hereof is good, and the Defendant had omitted to mention the attainder of the Father in their plea, Mr. Atturney for the Queen in the Replicate might have ſhewed it, for where there is matter which one ſide doth omit to plead, as not profitable for him, the adverſe party in his advantage ſhall be received to allege the ſame, A man hath two ſons by divers venters, a Baſtard or an Alien hath two ſons, if one of the Sons

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will intitle himſelf to be the brother & heir to the other, ſhal not the adverſe party allege by barr or replication, as the cauſe ſhall fall out, that the father had two wives, or that he was a Baſtard, or an Alien, what more certain, what more common in our books? now let us come to the inference made thereupon, where in the conveyance of the deſcent, mention muſt be made of the perſon attainted, there his attainder will hurt, but otherwiſe it is where the deſcent may well be conveyed, without making mention of ſuch perſon: I hold this difference not good, conſiſting more of form of pleading than matter of ſubſtance, as before I have ſaid; but if the deſcent between the anceſtors and the heir cannot be made in veritate, but by reaſon of a Cozinage that groweth by unity of blood attainted, and otherwiſe they be Cozins, I hold the matter ſo appearing in pleading, that the Attainder will be an impediment to the deſcent, as before I have proved. Now let us conſider the caſes of 17 E. 41 a feme had iſſue a ſon that was murthered, the Uncle could not have an appeal, becauſe the mother was diſabled, by the ſame reaſon, if the Mother had been attainted, the Uncle could not inherit the ſons land, et ſic è converſo: the reaſon, becauſe the Uncle to the Son, the ſon to the Uncle in their conveyance muſt needs mention the mother: I ſay that is not the main and material reaſon. But in as much as the Uncle and the ſon were compelled in Cozinage by the blood of the Mother, and her blood by her attainder unavailable to make any deſcent, therefore the one cannot ſucceed the other: And hereof I collect, that if the attainder of the mother be an Impediment to the Uncle to be heir to her ſon, albeit the Uncle deriveth no blood from her, but he and ſhe as participants of the blood they receiv'd from the Common ſtock above, a fortiori muſt her attainder be an impediment to her ſons, the one to be heir to the other, foraſmuch as they both do derive blood from her, and not the one from her, and the other from the common Anceſtor, as the Son and the Uncle do: But they do further inferr upon this caſe, That if a ſon had iſſue two ſons, and the one were murthered, the other ſhould have an appeal, and ſo if a man attainted have two ſons, one ſhall have an appeal of the others death. If I ſhould deny the caſes, the books vouched prove rather for me than againſt me, and they are æque dubii with our caſe in hand, yet I may anſwer them well, if I ſhould grant them: Firſt I hold a difference between a diſablement, which cometh natura, and that which groweth a culpa, for the one is odious and hateſull to the law, the other is not: I will explain the difference more hereafter. Alſo there is a difference between an action of appeal as heir, and the courſe of deſcent as heir to an Inheritance. The one is to receive an advancement, therefore an appeal is given to him that is not heir to the party murthered, but in the reſpect of the loſſe the party hath of him that is killed, and therefore by the Common Law the wife might have an appeal of the death of her Husband, as appeareth by Stamford, and that hath been agreed by all the Judges about 26 Eliz. That if the eldeſt ſon kill his father, The youngeſt ſhall have an appeal againſt his brother, and yet if his brother be attainted at his ſute, he ſhall never inherit his fathers lands. The caſe of 20 H. 6. 43. is, that one brought an appeal of the death of his Anceſtor, and made his deſcent as heir, viz. firſt Katherine file dels Anceſtor; And ſhewed that Kat. died in the life of the Anceſtor, yet adjudged that the appeal will not lie, becauſe he makes his deſcent by the Daughter that can have no appeal of the death of her father, and albeit ſhe were dead in the life of the Anceſtor, yet becauſe her iſſue muſt needs mention his Mother, therefore they ſay the appeal lies not; otherwiſe where omiſſion may be made, and therefore all the reſt of the caſes are put. 8 E. 1. 13 E. 3. 1 E. 3. 11 H. 6. 31 E. 3. bar. ult. all theſe caſes are, that if the ſon be attainted in the life of the Father, and

ſurvive, the land ſhall eſcheat; but if he dye without iſſue in the life of the Father, then his brother ſhall inherit the father, the reaſon they ſay, that being dead in the life of the Father, without iſſue, the other ſon ſhall make himſelf immediate heir to the father, but ſo could he not if brother attainted had ſurvived, that is but a formal reaſon, and not ſubſtantial, as ſhall appear out of theſe and the like caſes: A man hath iſſue two ſons by divers venters, and die ſeiſed, the eldeſt never entreth, or is ſeiſed, and dyeth without iſſue, the ſon of demy ſancke ſhall be heir to the Father; becauſe notwithſtanding the eldeſt ſon ſurvived the Father, and had no ſeiſin, the other ſon may make himſelf mediate heir to the Father. So if a Leaſe for life be made, or an eſtate tayl, the remainder to I. S. and his heirs, I. S. hath two ſons by ſeveral venters, and dieth, The eldeſt ſon after dieth without iſſue, the ſecond ſon ſhall be heir to the Father, albeit the firſt did ſurvive, cauſa qua ſupra, but in theſe caſes it is not evident and clear, That if the eldeſt ſon had been attainted, and ſurvived, and after died before any ſeiſin, that the other ſon ſhall not be heir to the Father; yet if your reaſon hold, he ſhould not hold, for he need not mention him in the deſcent from the Father; yea, that is formality. Here is matter that hinders this formality of pleading when it is diſclo ſed that is the attainder: even ſo in our caſe the reaſon is the ſame as here, and ſo are the caſes for me, and not againſt me. Every deſcent between brothers doth require to be of the whole bloud, both of Father and Mother, but Mother, in other collateral deſcents it ſufficeth to be heir of the part of the Fathers ſide, or of the part of Mothers ſide alone therefore the impediment of the Fathers ſide will not hinder one brother to be heir to another on the part of the mothers ſide, and è contra; and to this end theſe caſes have been put, If an Alien marry an Engliſh woman, and he have iſſue two Sons, the one purchaſeth and dyeth without iſſue, his brother ſhall be heir on the part of his Mother, although not of the part of the Father, and ſo if the ſon of a Baſtard purchaſe and dye without iſſue, his next Coſin on the part of the mother ſhall inherit. If one brother purchaſe and die, his brother enters and dieth without iſſue, and without heir of the part of the Father, his heir of the part of his Mother ſhall inherit, which cannot be, if the brother were heir to the brother ex parte matris tantum. If the Father be attainted, the ſon ſhall inherit the Mother, and if the Mother be attainted, the ſon ſhall inherit the Father; or elſe by the book, the Father having Charter of pardon and iſſue after, could not be tenant per le curtiſie, unleſſe the iſſue might inherit. The Concluſion thereupon is, That albeit Mary Hoby cannot be heir to her brother on the part of the Father, yet ſhe may be heir of part of the Mother: Firſt I anſwer the reaſons, and the caſes afterwards, and then the concluſion. It is true, that one brother that will ſucceed another as heir, muſt be of the whole bloud both of Father and Mother, and therefore it doth not abſolutely follow, that an Impediment of the Fathers ſide will not diſable them to be heir on the part of the mothers ſide, contr. But I rather conclude, That if of neceſsity brothers muſt be of the intire bloud of the Fathers and Mothers ſide, then uno deficiente deficit alter. But admit the Caſes to be Law, yet are they thus to be anſwered, there are Impediments to hinder deſcents of the part of the Fathers ſide, or of part of the Mothers ſide, ſome that happen ſine culpa, and ſome cum culpa civiliter, or criminaliter; thoſe that are civiliter, or ſine culpa, are ſuch as make the Father and Mother not capable of any deſcent, or heir ab initio, or à nativitate; thoſe that are criminaliter, or cum culpa, are ſuch as deprive or diſable the Father or Mother to be capable of any deſcent or heir, where before they were capable. The one ſort of Impediments will not happily hinder deſcents between brothers. Th'other will. Therefore,

fore, when in the firſt caſe an Engliſh woman hath iſſue by an Alien two ſons, and the one purchaſeth and dieth without iſſue, Now in default of heir of part of the Father, the heirs of part of the Mother ſhall inherit: But in this caſe the Father can have no heir, becauſe he is an alien, and never was capable of ſucceſſion; therefore the brother died with heir of the part of the Father, not becauſe the Father was diſabled culpa, and ſo forfeited the capacity he had to have an heir, but civiliter and ſine culpa, is never born and endued with any ſuch capacity. The ſecond caſe ſtandeth alſo upon the ſame reaſon. For the Father of the Purchaſor being a baſtard, was never inheritable to any deſcent, or can have other heir than the iſſue of his body. So as when the ſon of a baſtard doth purchaſe and die without iſſue, he alſo dieth without heir of part of the father, not becauſe his father hath loſt or forfeited by any crime or offence, the capacity he had to have any heir collateral: But for that he was never born worthy that dignity, and ſo *ab initio nativitatis* he never had it. But if a baſtard have iſſue two ſons, the one purchaſeth and dieth without iſſue, it is plain that his Brother ſhall be his heir, not *ex parte matris*, but *patris* as moſt worthy, and the father although a baſtard, yet he was inheritable by his blood to make his ſons or heir to an other, albeit himſelf could derive no blood from any Anceſtor whatſoever; for a baſtard may purchaſe, and have heir of his body, as his blood is available to make his ſon to inherit him. So alſo it is to make one of his ſons to inherit the other; and where there is an heir of the blood of the father, the heir of the blood of the mother ſhall never inherit the purchaſor; otherwiſe it is in the caſe of the Alien, for that he could not purchaſe to his own uſe, nor could his ſon without him, and by conſequence one of the ſons in regard of his blood cannot inherit the other; but in regard of the mother they might. But in this caſe alſo if the Alien be made Denizen, and then take an Engliſh woman to wife, & have two ſons; there becauſe each of them by poſſibility may inherit the father, they alſo ſhall be heirs the one to the other, not *ex parte matris*, but *ex parte patris*? Which reaſon proveth the third caſe to be grounded upon a fallacy; for albeit when one brother purchaſeth and dieth without iſſue, the other brother doth enter, and dyeth likewiſe without iſſue, and heir of the part of the father, that the heirs of the part of the mother ſhall inherit, yet the heirs of the part of the mother ſhall not inherit the ſecond brother, becauſe he did inherit his eldeſt brother *ex parte matris*; but becauſe that when a deſcent is *ex parte patris*, and then that line doth fail, by his death the land ſhall reſort to the heir of the Purchaſor of the part of his mother. So here, the ſecond brother had his land as heir to the brother *ex parte patris*, and when he died, having no heir of part of his brother by the fathers ſide, then it ſhall deſcend to the heirs of the brother the Purchaſor of part of his mother, which although ſhe be one mother to both brothers, yet her heirs ſhall inherit not as mother, not to the mother to the ſecond brother, but to the firſt that was the purchaſor. The 4th. Caſe ſeemeth at firſt to make much againſt me, and hath been very ſtrongly relyed upon; for thence the impediment grows *non culpa*, and doth diſable the father of that capacity, he once had, and now by his attainder hath loſt it, ſhall the ſon inherit the land of the mother, *et è contra*. But if this caſe be well examined it will not match with our caſe, nor make any thing againſt me; for between Husband and Wife there are ſeveral Lines of blood in conſanguinity and deſcent to be drawn: The Husband to have his heir, is to have his heir, which cannot be heir to the Wifes land, the Wife for her land is to have her heir, which cannot be heir to the Husband. And as they have ſeveral Inheritances, ſo by the Law they have ſeveral heirs by deſcent, whoſoever is heir to the Husband claimeth to

be heir in blood only from the Husband, not from the Wife, whoſoever claims to be heir to the Wife, claims only to be heir in blood to the Wife, and not to the Husband; and ſo muſt they that be heirs to either of them of neceſsity make their ſeveral reſorts and Line by their ſeveral blood, and not joyntly by both their bloods, when they claim by deſcent from either of them: As for example. A man is ſeiſed of land in fee in his own right, and alſo in right of his Wife, and they have iſſue a daughter, his wife dieth, and by another Wife hath iſſue a ſon, and then dyeth, the daughter ſhall inherit the mothers land, and the ſon the fathers land, and ſo ſeveral heirs, becauſe one is of the mothers blood, and the other of the fathers, and here the attainder of the father will not prejudice the daughter to inherit the mother, nor the attainder of the mother prejudice the ſon to inherit the father; becauſe the Lines by which theſe ſeveral heirs claim are ſeveral. A man ſeis'd in fee hath iſſue a daughter, and taketh a wife alſo ſeiſed in fee, and by her alſo hath another daughter, Theſe two daughters ſhall inherit the fathers land; but the laſt daughter only ſhall be heir to the mother: Here be two daughters only of demy lancke, and both theſe ſhall inherit the father; for in reſpect of him, they are of his intire blood, and therefore ſhall make one intire heir to him; but one daughter only is of the mothers blood, and therefore ſhall ſolely be heir to the mother, and between themſelves they are of demy lancke, and one cannot be heir to the other, and hereby doth appear a plain difference between deſcents from father and mother to their children, and between the brothers and ſiſters, for it ſufficeth that the ſon or the daughter be of the blood of either father or mother, viz. which of them have inheritance; but the brothers and ſiſters muſt of neceſsity be of the ſame father and mother, or elſe they cannot inherit one the other, and ſee the 4th. caſe put upon the 3 H. 7. matcheth not our caſe. Now put the caſe of one ſon as thus: The Husband and Wife have ſeveral inheritances, and they have iſſue one ſon, and dye, this ſon ſupplyeth the place of ſeveral heirs, and muſt make his claim and deſcent to land ſeverally, viz. to the lands of the father as ſon and heir to the father, and ſhall not intitle himſelf to that land as ſon to his mother, nor name his mother, and to the land of the Mother as ſon and heir to the mother, and never mention the father: And yet it is true that the ſon as he had a father, ſo had he a mother, and from them both doth derive his blood and iſſue; yet will it not follow, that by the attainder of the father the ſon ſhall be diſabled the mother; nor by attainder of the mother be diſabled to inherit the father, for the ſon claimeth not to be heir to both by the intire blood he receiveth from both; but ſeverally to be heir to the father by the blood from the father, and heir to the mother by the blood of the mother. And this will be plain if you do remember the diſtinction before made of blood. There is ſanguinis naturalis, and ſanguinis hereditarius. The ſon, as touching his natural blood, hath it proceeding both from the father and the mother, joyntly, intirely, and inſeperably: But as touching his hereditary blood, that is deſcended unto him, he hath that derivedly and ſeverally from his father for his Inheritance from his mother, for her Inheritance; Therefore the fathers attainder which doth not corrupt ſanguinem, but jus ſanguinis, is not the natural, but the hereditary blood may be an Impediment that the ſon cannot be his Heir, becauſe between them the Hereditary blood is corrupted. But it can be no impediment to the Son to inherit the Mothers Land, for that Hereditary blood between the Mother and the Sonne is not corrupted by the Attainder of the Father, ſo that hereby it appears that the Caſe collected, upon 13 H. 7. doth neither match our Caſe, nor make againſt me, and therefore the concluſion inferred thereupon is weaker

for

for Mary Hob. cannot be Heir to her Brother, by the bloud of the Mothers ſide, becauſe ſhe muſt be of the whole blood to her Brother both by Father and Mother, And both their bloods muſt unite in her, and continue alſo not one entire bloud naturall, but Hereditary. But by the Attainder of her Father for Hereditary bloud to her brother derived from the Father is corrupted, therefore by the Mothers blood ſolely ſhe cannot inherit her Brothers Land, albeit ſhe may inherit her mothers Land, for the Reaſon aforeſaid. But before I paſs further, I will object againſt my ſelf in this manner, Admit their Father had not been attainted, but their Mother, ſhould her attainder have diſcharg'd Mary to have been Heir to her Brother; yet will there be a difference between their Attainders, for admit alſo, as the other ſide would have it, that it ſufficeth for the ſiſter to be Heir to her Brother, either by the Fathers ſide, or by the Mothers ſide. Yet it is by Littleton plain as before I have ſhewed. That when one purchaſeth and dieth without iſſue, his next Cozin Collateral of the part of the Father muſt inherit, before the Heir of the part of the mother, hereof it followeth that Mary Hobbs, admitting that neither Father nor Mother were attainted, ſhould be Heir to her Brother by the bloud of her Father as the worthieſt, and not by the bloud of her Mother; And ſo then the Fathers bloud is ſanguine hæreditatis and not her Mothers bloud untill there be defect on the Fathers part. But the Father not being attainted, there is no defect, therefore though the mother be attainted, yet that Hereditary bloud from the Father which is found, and to be preferred, cannot be corrupted by the attainder of the Mother, And therefore Mary Hob. may by her Fathers blood be heir to her Brother. But on the other ſide, when the Father is attainted, then that Hereditary bloud which ſhould have had preferment to make M. heir to her Brother; is corrupted in Mary, and ſhe having that corrupted blood and living, that corrupted bloud in her is an impediment that the Mothers bloud cannot take place, for there is no difference when both bloods are in one perſon, and when they are in ſeveral perſons; As before I have ſhewed: for if Mary be Heir to her Brother on part of Father, ſhe cannot be Heir alſo of her Brother on part of the Mother. And then being to be preferred by the Line of her Father, and cannot becauſe his Linage is corrupted, that Line in her muſt be an impediment unto herſelf, that herſelf cannot be his Heir on the part of the Mother. But it hath been objected, that Brothers by the blood, that is, between themſelves, are immediate heirs one to the other, and ſo born Heirs one to the other, and that they have by their birthright cannot be taken from them by the act of a third perſon, but by their own act. And therefore the attainder of the Father cannot take away that immediate right between them to be Heir the one to the other. And if a man be attainted and have his Charter of pardon, he ſhall be Heir to the Father, and by conſequence, if he had two Sonnes after the pardon, the one of them ſhall be Heir to the other. That Brothers are immediate Heirs one to the other by any bloud between them derived from the one to the other, that I deny, for one Brother takes no bloud from the other, they are immediate Heirs by the bloud derived between them from their common Stock, which is the Father. And this is manifeſtly proved by all thoſe Authorities in our books, That if the eldeſt brother be attainted in the life of the father, his attainder ſhal not preiudice his younger brother to be heir to the father, if the eldeſt die without iſſue in the life of the father. The reaſon is, becauſe the youngeſt is of blood of the father, and by that bloud is now become Heir of the father, and is not of the eldeſt Sons bloud, for then his attainder would be an impediment to all of his bloud to inherit. And albeit Brothers by their birth are Inheritable one to the other, yet both the attainder ſo ſtrongly relate, That

look whatſoever they gained by their birth, by the bloud of their Father, there the ſame even from their birth, have they loſt, the ſame blood being corrupted, And therefore Stampford ſaith, albeit they were born noble, they are now ignoble from the birth as having loſt all dignity and advancement whatſoever they had by their birth. And when as a man taketh a Wife precontracted, and have two Sonnes, now at the time at their birth they are born inheritable one to the other, yet if divorce be had theſe Sonnes have again loſt from their birth, that they had by their birth, and as the divorce comming after maketh them to be no Children inheritable. So the Attainder ex poſt facto, makes them alſo no children inheritable, And where you vouch 9 H. 6. that if a man attainted have a pardon, and then have iſſue, that this iſſue ſhall inherit; I deny that book to be Law, for the contrary is proved by 1 E. 4. and divers other authorities, for the Attainder doth corrupt the bloud between Father and Son, as well ſuch as was born before the Attainder, as after, and a pardon coming after cannot make reſtitution of bloud, as all Authorities do agree. But it muſt be by Parl. and therefore there is a great difference between Charter of pardon & a Charter of denyzation, for if a Alien be made Denizen and then have a Son and purchaſe, his Sonne ſhall inherit, for while he was an Alien, he was not capable of inheritance to his own uſe, nor to have a Son and Heir; But when he was made free by his Denyzation, then there was a capacity in him to take inheritance, and to have an Heir to inherit him, not by way of reſtitution loſt and now reſtored, which the Queen by her Charter cannot do, but only to make the perſon free, and a Denizen, which by her Charter the Queen may do, and the deſcent is by conſequence in free bloud never corrupted and attainted, otherwiſe it is caſe of Attainder. But if you make ſuch interruption of deſcents, by reaſon of corrupted bloud, why, ſo you may do where the Grandfather was attainted, and the Father purchaſe, that his Sonne ſhall not inherit, for the ſame is of the Grandfathers corrupted bloud, which he received by his Father, yea, and ſo he is, if he will claim any Hereditary bloud from the Grandfather, viz. to claim to him, the Sonne ſhould be barred, But when the Sonne to inherit the Fathers Land, doth claim by the bloud Hereditary between him and his Father, and that by a freſh bloud and not by the old corrupted bloud, then is there no impediment, but that the freſh blood ſhall be available to make him heir to his Father. Laſtly, it hath been objected, that if is plain that if the Brother had died before the Attainder of the Father, then the ſiſter ſhould have been his Heir. And the Attainder after ſhould never devеſt that deſcent, and therefore as the Attainder after will not deſtroy the deſcent, the Attainder before will not diſable the deſcent Negate argumentum. A more neer heir will divеſt a a Deſcent of them that was one in by diſcent by a remote decree, as if a man died having a daughter his wife priviment enſeant with a ſon, now this daughter is Heir, and in by deſcent But when the ſon is born he now ſhall be Heir and the other deſcent avoided, But it is clear otherwiſe in caſe of attainder which giveth title of Eſcheat; And if when the title of Eſcheater came, the Lord hath a tenant in by title, he then hath no right to the land; for his right is for want of a tenant, but he findeth a tenant, and ſuch a one as is in by deſcent, whom the law favoureth. Otherwiſe it is when the title of the Eſcheat happeneth before the deſcent can come. And ſo is there none of thoſe Objections which are ſufficient to alter my former reaſons. Wherefore I conclude, that Mary Hobby cannot be heir to her brother Sir Philip, by reaſon their father was attainted. And ſo Judgement ought to be given for the Queen.

Upon

VPon evidence that term at Guid-hal, London, In the caſe of one Dalton. Where in debt upon an Obligation, where the Statute of Uſury was pleaded, It was ſaid by Poph. If a man lend 100 l. for a year, and to have 10 l. for the uſe of it. If the Obligor pays the 10 l. 20 days before it be due, That does not make the Obligation void, becauſe it was not corrupt. But if upon making the obligation, it had been agreed, that the ten pound ſhould have been paid within the time, that ſhould have been uſury. Becauſe he had not the 100 l. for the whole year. When the 10 l. was to be paid within the year. And verdict was given accordingly. *E. 42. Eliz.* *Uſury.*

IT was agreed, that if the Lord maim his Villain, he is infranchiſed.

Dorothy Watts *againſt* Brynes at Severſam.

IN an appeal of the death of her Husband. The Defendant there, upon the indictement was found guilty of Man-ſlaughter, And the iſſue was if he kill'd the Husband or not, and the evidence was very ſtrong againſt the Defendant. (ſcil.) The beginning of the quarrel was, On Monday there, the perſon that was kill'd beat the now Defendant. On Tueſday, Watts in the Defendants ſhop being a Butcher, flurted him on the Noſe. On Wedneſday, Watts, and one Biſſei walking by the ſhop, made a wry mouth at the Defendant: Upon which the Defendant comes out of the ſhop, with a ſhort ſword behind the back of Watts, and gives him a great ſtroak upon the calf of the legg, whereof he died. And the Court directed the Jury to find it murther. *Murther*

Iohnſon *againſt* Bacon.

IOhnſon of Graves-Inne recovered in debt againſt Bacon of Grays-Inne upon a bond of 400 l. Where the condition was to ſave harmleſſe, being ſurety for Bacon. And Bacon was outlawed after Judgement: And a cap. utlagat. was deliver'd to the Sheriff in Court. And now Bacon brought errour. And would aſsign errors without yielding himſelf in Execution, quod contra legem. By the Clerks, That a man outlawed may not take benefit of the Law, without a ſubmiſsion to it. *Time to aſsign Errors.*

Gage *againſt* Taylor.

IT was mov'd to reverſe a fine. Becauſe the writ of Covenant bore teſte 15 of April, returnable Quindena Paſchæ. And that year Quindena Paſch. was the 14 of April. And ſo the return was before the teſte. And the fine was revers'd. *To reverſe a fine.*

Hart *againſt* Arrowſmith.

THe Lord licences a Coppholder for life to make leaſe for twenty years; if he ſhall ſo long live. And he leaſes for years ſo generally. And a good leaſe; for the Lycenſe is purſued in effect.

A man was indited upon the Statute of E. 6. That in the Churchyard, ſuch a day, extraxit gladium againſt I. L. et ipſum percuſſit. And becauſe the Statute was, If any perſon malitiouſly ſtrike another, or ſhall draw any weapon with an intent to ſtrike any perſon.

And

And the Indiament was, quod extraxit. But does not ſay, ad percutiendum. And becauſe it is, quod percuſſit, without ſaying maliciose, The party was diſcharg'd upon Judgement.

Simſon *againſt* Gillion.

Where Treſpaſs may be brought by a Copyholder without a diſmiſſion.

Simſon brought treſpaſſe. And the Defendant pleads, That the land is Copyhold, and parcel of the Manor of Dale. And that J. Farmer in 24 Eliz. granted that to him by Copy. The Plaintiff replies, that Sir H. Farmer in 28 H. 8. granted it to one Thomas the Husband, and his wife, and their heirs. And the Husband dies, The Wife ſurvives and dies. J. Farmer admits the Defendant, and the Plaintiff as heir to the Wife re-enters, and upon that re-entry brought this action: Upon which the Defendant demurrs. And adjudg'd for the Plaintiff without argument. And the point was this, The Copy-holder dies, The Lord admits a ſtranger: The heir may enter, and upon the re-entry maintain treſpaſſe, without an admiſsion by the Lord.

Errour was brought upon a Judgement given in the Kings bench, in an action upon the caſe for an eſcape, and errour aſsign'd in this. That that action does not lie, but debt; And Judgement was affirm'd; becauſe he might have that action at Common Law: By the opinion of all the Juſtices of the Common Bench, and the Barons of the Exchequer.

A man ſaid, thou haſt ſtollen my Mare, or was conſenting to it. By Fenner and Clench, No action lies: For he may conſent tacendo, and yet be faultleſſe.

Biſſe *againſt* Wills.

Errour was aſsign'd, For that the venire fac. in the Common Bench was 12 liberos et legales homines quorum quilibet habeat quatuor librat. where the new Statute is quatuor libras. For it was ſaid that libratus is a pound weight: But becauſe it was a general caſe, the Juſtices would view how the Parliament Roll was, and it was found to be libras. And then it was mov'd again. And Poph. ſaid, That the intent of the Statute was only to have ſufficient Jurors. Gaudy agreed to that. And the Statute is to be expounded, as the uſage has been ever after the making of it. And the form of the writ is not upon any demand upon title. Fenner agreed. The Statute de mercatoribus, That the manner of the Recogniſance ſhall be of money ſtarling: But it is ſufficient, if it be lawfull money. To which Clench agreed: For it was ſaid, That if that ſhould be revers'd, a thouſand Judgements in the Common Bench would be revers'd upon the ſame point.

Rowles and Howe arreſt a man upon a laticat. And there was an Obligation made to the Sheriff, with a Condition to make an appearance; And the queſtion was if it be good: for he may make his appearance by his Atturney. Yet Clench and Fenner, exteris abſentibus, thought it to be good; for the law intends, that he is in perſon, when he is in Cuſtodia Mareſcall. And Kempe ſaid it was adjudged. Where Mr. Sackford Bayly of the liberty of St. Andrew, took an obligation in his own name, for a perſonal appearance, upon a laticat. At another day Doderidge mov'd that the bond was void. For the Statute being general, that he ſhall take a bond for his appearance, and the Sheriff hath

hath not taken a bond for his perſonal appearance, and he may anſwer to the action by his Atturney; but that he ought to be alwaps in Cuſtodia Mareſcall. which is intended in propr perſon, and ought to put in bapl, which is good enough. And it was rul'd, that Judgement ſhould be entred for the Plaintiff, unleſſe better cauſe were ſhewed within 4 daps. And ſo it was adjudg'd. 30 Eliz. rot. 126. In Banſtons the Sheriff of Suſſex.

Edward Darcy Eſquire } Plaintiff. { Thomas Allin of London Haberdaſher } Defendant.

Action upon the Caſe.

Mr. Fuller,

The Plaintiff declareth, That whereas the Qu. perceiving that divers ſubjects of able bodies which might go to plow, did imploy themſelves in the art of making of cards, ſhe did by her Letters Patents, dated the 13 Iunii, anno 30. grant to Ralph Bowes Eſquire, That he by himſelf, his factors and aſsigns, as well Denizens as Strangers, might buy and provide beyond the ſeas playing cards, and cauſe them to be brought into England, or in her dominions, by whatſoever means, and to utter, ſell or diſtribute the ſame in groſſe, or by retail, and that he ſhould have the whole trade of making and ſelling of Cards in England, &c. And that none ſhould have the making and ſelling of cards within her Dominions, but he, for 12 pears, ſtreightly reſtraining all other ſubjects other than the ſaid Ralph Bowes his factors and aſſignes from the making and ſelling thereof.

Then he rehearſeth the Letters Patents made to himſelf, dated 11 Auguſt. anno 40. for 12 pears, to begin after the expiration of the former term of 21 pears, and that he was poſſeſſed of that intereſt, and that the former term expired 13 Iunii, anno 42. and that he uſed Iunii, cauſed 4000 groſſe of cards to be made in London at his charges, amounting to 5000 l. for the neceſſary uſe of the ſubjects. *Note neceſſary uſe.*

That the Defendant knowing the premiſes 15 Maii, anno 44. cauſed 80 groſſe of cards to be made, he being a ſubject, and no aſsignee or factor to the Plaintiff, And that the Defendant 16 Maii, anno 44. did ſell half a groſſe of playing Cards to John Freer and Francis Freer for 13 s. 4. d. which were not made in England, or brought into England by the Plaintiff or his factor, without licence of the Queen, or conſent of the Plaintiff, he being a ſubject, whereby the Plaintiff was defrauded of the benefit which he was to enjoy by his charter to his damages of 200 l.

The Defendant pleadeth to all, except half groſſe of Cards ſold to Iohn Freer, and Francis Freer, not guilty, and for them pleadeth that the City of London is an ancient City, and that from time whereof no memory of man is to the contrary, within the ſame City, There hath been a fellowſhip or Company of Citizens called Haberdaſhers of London: And that within the ſame City one lawfull cuſtom hath been uſed de tempore, &c. That every Citizen of the ſaid Company may buy, ſell, and merchandize all things merchandable within the Realm of England. And ſheweth that the Defendant tempore quo, &c. and before and ſince was a Citizen and Haberdaſher of London: And that by reaſon thereof he did ſell the ſaid groſſe of cards, as was lawfull for him to do, and aver-

averreth that they were things merchantable.

To this plea the Plaintiff hath Demurred in Law.

Edward Darcy Esq. Plaintiff, : Thomas Allin Defendant.

Mr. Fuller:

This cause is of great weight, and to be dealt in with good regard, for on the one side, it concerneth the prerogative of the Queens Majesty in a material point thereof; and on the other side it doth concern many of her Majesties subjects in present; and in the rule thereof it may concern all the subjects in England; And yet the cause is such, as may, yea ought to be disputed and censured before Competent Judges, as this Court is. For I learn in Bracton, lib. 1. cap. 8. thus. Ipse autem Rex non debet esse sub homine, sed sub Deo et sub lege, quia lex facit regem, attribuat igitur Rex legi quod lex attribuat ei. And after he saith, Non est enim Rex ubi dominatur voluntas, et non lex: which latter words, as also the cases following, prove the intent to be sub lege loquente. According to the opinion of Bracton it is said 19 H. 6. fo. 62. That the Law is the most high inheritance of the Realm, by which the King and all his subjects are governed; and that if the Law were not, there would neither be King nor inheritance: for to outrun the Law, is to haste to confusion.

This Law all subjects are bound to obey, and the Queens Majesty hath given her assent to perform the same in some sort at her coronation by her Oath, which I know not precisely what it is; But I find by the Statut. s of 2 E. 3. and 14 E. 3. and others, That the King shall grant no pardon contrary to his oath, and that if he do grant any such pardon contrary to his oath, it shall be void; which sheweth, that his oath referreth to some rules of Law. And to come near to the point of prerogative, it is said in the Commentaries, fol. 236. That the Law doth so admeasure the Kings prerogative, that it shall not tend to the prejudice or hurt of the inheritance of any of his Subjects.

2 E. 3. cap. 2. 14 E. 3. cal. 15. Com. fo. 236.

Being thus inabled to speak in this weighty cause, to the intent that the whole course of my argument may the better be conceived, I have divided that into these heads.

1. That all Patents concerning the King and his subjects are to receive exposition and allowance how far they are lawfull, and how far not, by the Judges of the Law.

2. That the Judges in the exposition of the Kings Letters Patents, are to be guided not by the precise letters, and words of the Letters Patents, but by the Laws of the Realm, the Laws of God, and according to the antient allowance thereof. And herein I mean the Laws of God, because we are now the house of God and the people of God; the Jews being cut off to whom God was the Law-giver, and we being ingrafted in their stead: so as the Judgements that are executed, are not the Judgments of men, but of God, and he is with them in the cause and in the Judgement.

3. That the Letters Patents made to the Plaintiff are contrary to the Laws of the Realm, contrary to the Laws of God, hurtfull to the Commonwealth, and in no part good or allowable.

4. That

4. That the action upon the caſe grounded upon this void Patent, is no lawfull action.

5. In the laſt place I will anſwer all the material matters and caſes that have been alleged on the Plaintiffs part, To the intent that this Monopoly Patent ſhould have no ground to ſtand upon.

In the argument of this caſe I am eaſed much: For that it is confeſſed by Mr. Solicitor, who very learnedly argued on the part of the Plaintiff, that ſuch Letters Patents as tended to change the Law, or courſe of any mans inheritance, or that was contra commune jus, or that tended to any general charge of the Subjects, were void in Law, for which I meant to have put divers Caſes, which I omit.

It is agreed by the Court, That the grants of the King ſhall not be expounded according to the Letter; but according to the antient allowance; and to prove the ſame, I will put ſome particular Caſes. 19 H. 7. f. 14.

The Kings grants in many caſes are controlled by the Judges of the Law for the benefit of the King, contrary to the expreſſe letters of the grant. As when the King granteth the Manor of Dale, and all manner of woods, underwoods, mines and quarries in the ſame: yet mynes of gold and ſilver ſhall not paſſe. And ſo when the goods and chattels of perſons qualitercunque damnatorum are granted; yet the goods of perſons attainted of treaſon paſſe not, becauſe by rule of Law theſe things of prerogative will not paſſe by ſuch general words. So in Caſes that concern the Subjects as ſhall hereafter appear, the Judges ſhall controll Patents contrary to the Letters, becauſe they have like rules of Law ſo to do, whereby it ſhall appear that the Judges ſtand indifferent between the King and his Subjects, for which many caſes more might be put on the Kings part: for power of Judgement is ſo committed to the Judges. Com. fo. 337. 45 aſſ. p. 15. 22 aſſ. p. 49.

Now I will ſhew you that Patents ſhall be controlled for Juſtice ſake, albeit they do concern but particular perſons, and not generall ones. 1 E. 3. fo. 26.

The King granteth to I. S. that he ſhall not be ſued by N. T. this is void: So when it is more particular. As when the King doth grant to the Chancellor of Oxford, that he ſhall not be ſued for debt or treſpaſſe concerning his office, is void. And when the King doth grant Conuſans de plee licet ipſemet fuerit pars, or generally, not naming before whom, is void for the reaſons abovelaid, being contrary to the rule of Juſtice. 8 H. 6. fo. 19. 1 H. 4. fo. 6. 44 E. 3. fo. 27. 6 H. 4. fo. 1.

A Commiſſion is granted under the great Seal of England to perſons of Credit, to take the bodie and goods of I. S. without indictment and due proceeding according to Law. This is adjudged unlawful. 42 aſſ. p. 5.

A Commiſſion is awarded to perſons of credit to examine the title of Scrogges concerning the office of Exigenter, and to commit him to priſon, if he refuſed. Scrogges refuſed, and was committed to priſon, but was delivered by the Judges of the Common place upon a Habeas 13 El. fo. 275

corpus, as an unlawful impriſonment, the reaſons I gather to bee theſe,

And againſt him, when he commanded contrarily.

The Law knoweth no Commandement but by writ, nor no Miniſter to execute the Commandements of the Law, but the Sheriff and the officers under him, for he is the only Lieutenant in the time of peace, who is to be guided by the Law, and to be controlled, if he follow not the courſe of Law in the commandements of the King or of the Law.

13 *Eliz. cap.* 7. 23 *H.* 5. *cap.* 5.

For Commiſsions to ſubjects of any abſolute power, which be occaſions of abſolute wrongs, as the Law knoweth them not, ſo the Law alloweth not ſuch proceedings. I do not here ſpeak of Juſtices of peace, who have power given them by divers Statutes, who if they exceed their power, are to be puniſhed by law, nor of Commiſsioners of Bankrupts, nor of Sewers, which are grounded upon particular Acts of Parliament.

Now touching Patents that tend to prejudice or to charge particular ſubjects, how they are to be controlled, I will put ſome caſes.

19 *E.* 3 *fo.* 39. 46 *E.* 3. *Pat.* 19.

20 acres of Land are holden of the Biſhop of Wincheſter, by I. S. I.S. granteth the ſame 20 acres to the King, to the intent that the King ſhould grant them in Mortmayne to a Monaſtery; which is done accordingly. Afterwards, notwithſtanding that the grant to the King were lawfull, and the grant of the King to the Monaſtery in it ſelf is lawfull; yet becauſe it tended to take away the mean ſurrender of the Biſhop of Wincheſter, upon Petition it was repelled.

13 *H.* 4 *fo.* 15.

The King granted to A B his ſervant the office of meaſuring of cloth in London, with a fee, and a writ was awarded to the Mayor and Sheriffs of London to put him in poſſeſsion thereof, who refuſed to put him in poſſeſsion, and returned that there is no ſuch office in London. Hereupon it is excellently argued by the Judges, how far the King may charge his ſubjects by his Patents, and agreed, that without the Parliament the King cannot grant any new office with charge to charge the Subjects: And although in this caſe there had been a former grant of this office to an other man deceaſed, and that he had executed the office, and received ſome Fees for a time, yet the Judges thought that ſeiſin by wrong upon an unlawfull Patent to be of no force.

13 *H.* 4. *fo.* 15. 50 *E.* 3. *tit. par.* 112. *Book.*

It is agreed, that the King cannot grant toll to be taken in the highway, which is free, but pontage and murage may be granted; becauſe there is quid pro quo; and no longer than the bridge is maintained for uſe of the Subjects, nor ſhall continue for defence of the Subject, the toll is not due to be paid for the pontage, nor for the murage.

22 *H.* 6 *fo.* 14. 21 *E.* 4 *fo.* 1.

Like learning in the Caſes of the Office of Brocage, tonage, &c. and the difference between the Clerk of the Market and ſuch offices.

49 *E.* 3. *fo.* 5. 50 *Aſſ. p.* 1. 16 *E.* 4 *fo.* 4.

I. S. is indebted to R. in 20 l. by contract. R. is outlawed, the Queen ſhall not have this debt, for the Queen ſhall rather loſe this debt, than the ſubject loſe the benefit of waging of Law, wherein it is to be noted, how indifferent the Law is for the Subject.

The

The King shall not arrest one for suspicion of felony or treason, because if it be without cause the subject hath no remedy. By Markham. So that the King shall rather lose the liberty that a subject hath, than that the Subject shall lose the benefit of his action. *4 H. 7 f. 4. prerog. 139. Brook.*

To come near to the point of prerogative, the King did grant a protection, quia profecturus, to I. B. and sheweth it was for the service of the King, and of his Realm at Rome, to continue for 3 years, et sit quietus ab omnibus actionibus sectis, &c. and it was refused by the Judges, for that it was for 3 years, and the law alloweth but for one year. And for that there was not exception of Dower; quare impedit and assize, as should be in such protections. *39 H. 6 f. 39.*

A protection was granted to I. B. quia profecturus in a voyage royal with the King into Ireland, and rejected by the Judges, because it was no voyage royal into Ireland, otherwise in Scotland. Per Noyle. Note that these protections are not to take any thing from the Subject; but tend only to delay the lawfull sutes of some particular Subjects, and yet rejected as abodesaid. *1 E. 4. f. 29.*

Now touching the Kings mercy, how that shall be controuled for the good of the Subjects, it is meet to see.

The King doth pardon I. S. the making or repairing of a Bridge, which he ought to do: Now for that in this Bridge the Subjects have a use or kind of interest, for that reason the pardon is void. 2 R. 3. Rex potest dare licentiam alicui ad deferend. literas apostolicas infra hoc regnum, ubi tantum regem tangat, sed non ubi tangat partem *Com f. 48 3 E. 1. Nor. h f. ff. 445. 2 R. 13. f. 12.*

Thus it appeareth how all the attributes given to the King, of power, Justice and mercy are in him to dispose to the good of the Subjects; that Justice controuleth both the power and mercy in grants, Commissions, protections, pardons, as for the good of the Subject in the time of 1 E. 3. H. 4. H. 6. E. 4. H. 7. &c. why did the Judges withstand the Kings Letters, Patents in this sort? And why are these things recorded and left to us; but that it may appear to the ages following what great care those reverend Judges had to leave the Land and People in like liberty to the ages following as they found it, and so ought every man in conscience in his place to have the like care. *This confluent course of Justice between the highest and the lowest maketh the law honourable, and the Judges and Counsellors that passe that course to be honoured and beloved of all men.*

Now touhing this particular Patent.

The pretence is chiefly upon this, viz. that the Queen may restrain all Card-playing, and then by consequence all making, buying and selling of Cards, because for the good of the whole Common-wealth, the Card-maker or seller may receive particular losse in his trade.

Fiirst it is not to be confessed, that the Queen may by Letters, Patents without Parliament restrain all Card-playing, which I will prove by reason, use, and by intent of Statutes. *Rsp.*

For this is true without any contradiction, That no man can continue always in labour, always in reading, or always in meditation, but he must have reasonable recreation, and all persons cannot take recreation

abroad, ſo; ſome be ſick, weak, o; impotent, that need refreſhing, ſome ſeaſons are ſuch, as that there is no recreation abroad, and in theſe times, and to theſe perſons to make reſtraint is wrong.

Fo; as Mr. Sollicito; ſaid, that the benefit of government was not that the ſubjects ſhould live ſafely only, but ſutè vivere, pacificè vivere, honeſtè vivere, et jucundè vivere. And the law in ages paſt alloweth as much: Fo; Cicero ſaith, that lex eſt vinculum civitatis, fundamentum libertatis, & fons æquitatis; and how can it be ſaid that freemen ſhould according to the Statute of Magna charta, uſe libertatibus et liberis conſuetudinibus ſuis, When Mr. Darcy hath a Patent to reſtrain Cards, another to reſtrain tennis play, another hawking and hunting, &c. Is not this to make freemen bondmen? And if the Queen cannot to maintain her war, take from her ſubject 12 d. but by Parliament, much leſſe may ſhe take moderate recreation from all ſubjects, which hath continued ſo long, and is ſo univerſal in every Countrey, City, Town and Houſhould; but to puniſh the abuſe is neceſſary: Fo; Common weals are not made fo; Kings, But Kings fo; Common weals.

Mag. Car. c. 29.

25 E. 3. a. 8.

The Statutes of 12 R. 11 H. 4. do ſhew plainly that none were reſtrained from playing at dice, but ſervants, and they not altogether reſtrained, but at times, and from card-playing none reſtrained until 33 H. 8. and in that Statute, certain perſons and certain places reſtrained, which declareth the intents of the Parliaments to be, that it ſhould be lawfull fo; the reſt not reſtrained, and fo; them reſtrained in the times preſcribed fo; times fo; them to play in.

12 R. 2. cap. 6.
11 H. 4. cap. 4.
33 H. 8. cap. 9.

And if in the times of R. R. 2. H. 4. and 5. it was thought neceſſary to have ſeveral acts of Parliament to reſtrain the uſe of playing in ſervants, much more is it neceſſary to have an act of Parliament to reſtrain all the ſubjects of the Realm from the moderate uſe of playing, and not by Letters Patents only.

But allow that the Queen could reſtrain Card-playing; Yet that proveth not that this Patent is good, which reſtraineth not the place, but rather increaſeth playing at cards, and taketh away the trade of making and ſelling of cards from many ſubjects that uſed it well, and giveth it to another that knoweth not how to uſe it: Fo; thus ſhould the argument be to uphold this monopoly Patent.

Major.	All Patents made fo; the general good of the Realm may reſtrain ſome ſubjects in their particular trades lawfully.
Minor.	But this Patent is made fo; the general good of the Realm.
Concluſio.	Therefore this Patent may reſtrain ſome in their particular trades lawfully.

The Minor Propoſition o; aſſumption is untrue, and that I will prove ſo plainly as no man ſhall gainſay that, and ſo the force of theſe Letters Patents muſt needs fall to ground.

Be-

Before the making of theſe Letters Patents, many ſubjects were ſet on work in making of cards, as the preamble of the Patent doth partly expreſſe and as in truth it is, for that many Carvers, Painters, Carpenters, Card-makers and Card ſellers maintained themſelves, their Children and families by their trade.

And now Mr. Darcy hath power to bring all from beyond Seas, contrary to the intent of the Statute of 3 E. 4. cap. 6. 1 R. 3. cap. 12. and to reſtrain all the Subiects from making and ſelling of the ſame, which is a manifeſt hurt to the Realm, by the opinion of 2 Parliaments. 3 E. 4 cap. 6 1 R. 3. cap. 12.

Where before this Patent, men skilfull in the trade, being ſubjects born, and brought up 7 years as apprentices in the trade, according to the Statute of 5 Eliz. were imployed in this work in due order, to be ſeen and corrected by the Wardens of the company.

Now Mr. Darcy may ſet to work in this trade I. a Do ne, and his fellows, without any view ſearch or correction: Yea he may ſet a work only ſtrangers if he will, which is alſo hurfull to the Realm.

Where before cards were, and ought to be ſold at reaſonable prizes, or elſe to be puniſhed as inhaunceers of merchandize, as appeareth 27 E. 3. by the Common laws of the Realm.

Now Mr. Darcy by the words of this Patent may ſell cards for his moſt advantage, as he doth, viz. one groſſe for 35 s. where the Haberdathers have offered to ſell better for 20s. the groſſe, and this is malum in ſe againſt the Common Law, that cannot be diſpenced with by Pat. as malum prohibitum may be.

Where before if any made naughty and falſe cards, one might buy of others better cards; for that there were then many makers and many ſellers.

Now by this Patent, be they good, be they bad; be they falſe, be they true; be they dear, or good cheap, you muſt buy all of him and his aſſignes, in what manner pleaſeth him.

Where before if any perſon by his induſtry had obtained excellent skil in his trade, he might have reaped the fruits thereof, and that hath been thought the ſureſt thing a man could obtain, skil and knowledge, becauſe theeves could not ſteal it.

Now Mr. Darcy hath deviſed a means to take away a mans skill from him, which was never heard of before, which if others ſhould do the like in other trades, it would diſcourage men to labour to be skilful in any art, and bring in barbariſm and confuſion.

Where by the Lawes of God, the Poore and the Stranger were to be relieved with the gleaning of the Harveſt, and the latter grapes of the Vintage.

Mr. Darcy, by his Patent may take all the Harveſt and Vintage of this trade from the natural ſubjects, & give it to ſtrangers, and not leave ſo much as the gleaning of the Harveſt or latter grapes of the Vintage

tage for natural born Subjects, which is an hatefull thing:

And may not theſe ſubjects thus put from their trade, ſay as the Steward in the Goſpel ſaid, when he was put out of ſervice, What ſhall I do? digg I cannot, and to begg I am aſhamed, I will uſe this fraud, &c. And if none will truſt them to be beguiled, then will they robb and ſteal, and become theeves and traitors: for extremity breedeth nothing but theſts, and then what comfort this will be to him that procured this miſchief, I leave to God and his own conſcience, remembring this withall, that Bracton ſaith, It is a good part of a King to reject no perſon, but to make every perſon profitable to the Commonwealth. And Cicero ſaith, Qui autem parti conſulunt, partemque negligunt, ſeditiones & diſcordias inducunt.

Now to prove that it is againſt the Law of God and Man

7 h. ff. cap. 3. The Ordinance of God is, that every man ſhould live by labour, and that he that will not labour, let him not eat.

This general Ordinance of God, by the policy of the Realm, and by the laws and cuſtoms of the ſame, is diſtributed into ſeveral arts manual occupations and trades, whereby we may have the mutual help one of another, and all governed in due order by the Wardens and Governours of the ſame ſociety and fellowſhip.

Now therefore it is as unlawful to prohibit a man not to live by the Labour of his own trade, wherein he was brought up as an Apprentice, and was lawfully uſed, as to prohibite him not to live by Labour, which if it were by act of Parliament, it were a void act: for an act of Parliament againſt the Law of God, directly is void, as is expreſſed in the book of Doctor and Student, much more Letters Patents againſt the Law of God are void.

But Mr. Darcy will ſay this is no neceſſary trade, and therefore, &c. ſo others may ſay the like of ſilk lace, another of womens tyers, another of gilt rapiers and gilt daggers, and ſome already have added a reaſon for the only making of aqua vitæ aqua compoſita, vineger & allegant throughout the whole Realm, whereby the ſeveral trades that now maintain many thouſand good Subjects may be cut off by Letters Patents at an inſtant upon bare ſuggeſtion, which ought only to be done in Parliament; where amongſt the aſſembly of ſuch wiſe men, ſome will conſider the inconvenience, ſome the damage, ſome the profit, ſome the miſchief; ſome what is meet for this place, ſome for that place: Therefore it is well ſaid of Plato, Except wiſe men be made Governours, or Governours made wiſe men, mankind ſhall never have quiet reſt, nor vertue be able to defend it ſelf

2 H. 5. fo. 5. Now I will put a caſe of the Common Law. I. S. is bound to A. B. in 40 l. That he ſhall not uſe the trade of a Dyer in the Town of Dale for the ſpace of half a year. The Condition of this Bond is thought to be againſt the Law, to reſtrain a man from his lawful trade, though it were but in one town, and but for half a year: much more this Patent, which is to reſtrain men from their trade 21 years, and throughout the whole Realm. The like Patent whereof is not to be found in any record, or in

in any Book case within this Realm, since the conquest, until within 30 or 30 years last past, which I doe more confidently affirm, because Sr. Sollicitor being a very learned man, and others who have argued in this Cause for the Plaintiff, after much search and study cannot find any such Case or record.

I will put other Cases where the Laws of God and the Laws of the Realm do agree, as one ruled by the rule of the other, to Confound this Monopoly patent.

Thou shalt not take to pledge the upper or nether millstone, for it is his living. By this Law none may take to pawn that which was the living of an other, and so to force him to seek an other trade, though constrained by need, he give his consent thereunto. *Deut. 24. 6.*

But Sr. Darcy will take from men against their wills, their living and lawful trade, and force them to seek other trades, directly contrary to the Law of God.

Agreeing to this rule of God are these book-cases, viz. That none shall distrain, which is a kind of taking to pledge, the upper or nether millstone; yea, though the millstone be not then upon the mill, but lieth in the house to be picked, because it is his living, where the other goods in the house are distrainable by Law. *14 H. 8. 9. 25.*

In like manner the Anvil in the Smiths shop, the Garment in the Taylors shop, the House within an Inne, or at a Smiths forge a shoeing, are not distrainable, because it is their Trades and living, although the rest of the goods in the house are distrainable. *22 E. 4. 49.*

This difference I have always thought reasonable, that because Justice floweth from the Queen, as from the head or fountain of Justice, that therefore she may grant or restrain the same, more liberally or more sparingly, as she thinketh good, according to the rules of Law.

As to grant Conusans of pleas in such actions, within such precincts as she thinks good, and to save the defaults of the Tenant by writ of warrantia die, giving of power to make attorneys in Court by dedimus potestatem, and such like things.

But arts, and skill of manual occupations rise not from the King, but from the labour and industry of men, and by the gifts of God to them, tending to the good of the Common-wealth, and of the King, the head thereof, and do meet with commutative Justice by the way, to see that there be just measure and just weight in things to be measured and weighed; and that no deceipt or fraud be used therein, to the deceipt of the subjects, and for that purpose the offices of the Clark of the Market, gager, and garbler, &c. are used, but to restrain men from any lawful trade whereunto they are inclined, is unnatural and unmeet.

By these Statutes and others, as well all Merchant strangers as Denizens, have liberty granted to them to bring their wares into England, and to sell the same in grosse, or by retail; notwithstanding any patent, privilege or custom to the contrary: therefore this Monopoly patent to restrain, or take away that from the Subjects being Merchants, which was *9 E. 3. cap. 1. 25 E. 3. cap. 2.*

given unto them by Parliament, is not good in Law, for it is not like
25 E. 3. cap. 2. the Case where the King may dispense with malum prohibitum, and there it is said, That such a charter is hurtful to the King and to his people.

26 H. 8. cap. 10. 31 E. 3. cap. 9. And the Statute of 26 H. 8. cap. 10. doth give power to the King during his life to restrain or set at liberty traffick beyond the Seas for certain Countries, which as had been an Idle and vain act, if the King by Letters Patents might have done so much without an. And the writ of Ne exeas Regnum, was never granted generally against all Merchants, but against particular persons, for particular causes; for if partial affection by private discretion do govern publique affairs, there one mans will becometh every mans misery.

Case de Alton woods, fo. 44. It is a ground in Law, That the King by his Patent cannot do wrong, as to make discont. &c. and that his prerogative is no warrant to injury any Subject.

1 H. 4. c. 8. 21 Ass. 24. 2 H. 4. fo. 168. And fith the Law is clear, That if the King grant my lands or goods, the grant is void and unlawfull, I see no reason when the King cannot grant away 22 d. which I have gotten by my trade, that he should grant away my trade whereby I got that 22 d. and maintained my wife and children.

That this is a Monopoly Patent it appeareth by the description or definition set forth by Mr. Solicitor, which is this. It is a Monopoly cum pœnes vestrum potestas vendendi sit. But when there be many sellers, although they be all free of one Company: as Goldsmiths, Clothiers, Merchants, Drapers, Taylors, Shoomakers, Tanners, and such like, who have setled governments, and Wardens and Governours to keep them in order, they were never accounted a Monopoly, which the Statute of
5 Eliz. c. 4. Anno 5 Eliz. in some sort prohibiteth, because to many of these trades all persons are prohibited to use the same, but only such as have served in the same trade seven years, as an apprentice. But if they, or any other like society, should conspire together to inhaunce the prices of their wares, or of their labours, it is a thing punishable by the Common laws, presentable in every Court, and to be Censured severely in the Star-chamber; But in this Patent the sole and whole traffick for the making, buying and selling of Cards throughout the Realm is given to Mr. Darcy and his assignes only for Twenty one years; which is a plain Monopoly Patent.

Now therefore I will shew you how the Judges have heretofore allowed of Monopoly Patents, which is, That where any man by his own charge and industry, or by his own wit or invention doth bring any new trade into the Realm, or any Engine tending to the furtherance of a trade that never was used before; And that for the good of the Realm; That in such Cases the King may grant to him a Monopoly Patent for some reasonable time, until the subjects may learn the same, in consideration of the good that he doth bring by his Invention to the Commonwealth: otherwise not.

In the 9th Eliz. there was a Patent granted to Mr. Hastinges of the Court. That in consideration that he brought in the skill of making of Frisadoes as they were made in Harlem and Amsterdam beyond the seas, being

being not uſed in England: That therefore he ſhould have the ſole trade of the making and ſelling thereof for divers years; charging all other Subjects not to make any Friſadoes in England during that time, upon pain to forfeit the ſame Friſadoes by them made, and to forfeit alſo 100 l. the one moyety thereof to the Queens Majeſtie, the other to Mr. Haſtings: Upon which Patent Mr. Haſtings about 20 years paſt exhibited an information in the Exchequer againſt certain Clothiers of Coxſall for making of Friſadoes, contrary to the intent of this Patent. To which Information, for that it was againſt Law to have ſuch penalties of the goods, and 100 l. to be forfeited by force of a Letter Patent; Therefore did demur upon the Information, and moved the Court, and the opinion of the Court being clear againſt him, he never went further in his information: But exhibited his Engliſh bill in the Exchequer chamber againſt them, where upon the examination of the cauſe it appeard that the ſame Clothiers did make baies very like to Mr. Haſtings Friſadoiwes, and that they uſed to make them before Mr. Haſtings Patent; for which cauſe they were neither puniſhed nor reſtrained from making their Baies like to his Friſadoes.

Another Monopoly Patent was granted to Mr. Matthey a Cutler at Fleetbridge in the beginning of this Queens time, which I have here in Court to ſhew, by which Patent it was granted unto him the ſole making of Knives with bone hafts and plates of lattin; becauſe as the Patent ſuggeſted, he brought the firſt uſe thereof from beyond ſeas; Yet nevertheleſſe when the Wardens of the Company of Cutlers did ſhew before ſome of the Counſel, and ſome learned in the Law, that they did uſe to make knives before, though not with ſuch hafts, that ſuch a light difference or invention ſhould be no cauſe to reſtrain them, wherupon he could never have benefit of this Patent, although he laboured very greatly therein.

Laſtly the monopoly Patent granted to one Humphrey of the Tower, for the ſole and only uſe of a Sive or Inſtrument for melting of lead, ſuppoſing that it was of his own invention, and therefore prohibited all others to uſe the ſame for a time: And becauſe others uſed the like inſtrument in Darbyſhire, contrary to the intent of his Patent, Therefore he did ſue them in the Exchequer Chamber by Engliſh Bill. In which Court the queſtion was, whether it was newly invented by him, whereby he might have the ſole privilege, or elſe uſed before at Mendiff in the Weſt Country, which if it were there before uſed, then the Court was of opinion he ſhould not have the ſole uſe thereof.

In Eaſter term laſt, in the Kings bench Gowby brought an action of treſpaſſe againſt Knight for falſe impriſonment. Knight juſtified becauſe of the Mayor and Citizens of Cant. have uſed time of mind to nominate a Town Chandler within Cant. and that all the Butchers within Canter. ſhould ſell their tallow to him at ſuch a price as the Mayor ſhould appoint, or elſe to be committed: And that becauſe the Plaintiff was a Butcher in the Town, and refuſed to ſell his tallow to the Town Chandler, was committed, and ſo juſtified, &c. Whereupon the Court was moved this term, that the iſſue concerning the cuſtom might be tryed out of Cant. And the Court then thought that the cuſtom was not good, but unreaſonable and unlawfull, becauſe it did tend to a Monopoly. Wherefore the Plaintiff did demur upon the ſame plea.

Now touching the action of the Caſe grounded upon the Monopoly Patent.

There is no wrong done to the Plaintiff by the Defendant ſelling of cards better cheap than the Plaintiff would, though he received loſſe, and therefore no cauſe of action, like unto the caſe of 11 H. 4. f. 47. where there was a ſchool of long continuance, and another had erected a new
11 H. 4 f. 47. School in the ſame Town; whereby the School-maſter of the ancient ſchool gained not ſo much as he did before, yet he could have no action againſt the new ſchool-maſter for the ſame: And Mr. Darcies caſe is much ſtronger againſt him; for that he newly intruding into the trade of making & ſelling of Cards, doth bring his action againſt the ancient Card-ſeller for hindring his ſale: which is all one, as if the new ſchool-maſter ſhould bring his action againſt the old ſchool-maſter for teaching ſo well that he cannot gain ſo much by teaching his ſcholars as he deſired, which the law will not allow, being damnum abſque injuria, as in this Caſe.

22 H. 6 fo. 14. A Man hath a Mill in a Town of ancient continuance, and another buildeth a Mill in the ſame Town, whereby ſome of his Cuſtomers doth forſake the ancient Mill, this is no wrong though it be damage, and therefore no cauſe of action, and there alſo I compare that to this Caſe.

I. S. hath a paſture in the town of Dale, where the tenants do uſe ſometimes to put their Cattel to Joſt, and another perſon in the ſame Town doth recover grounds overflown with water, and doth make that good paſture, where the tenants have Cattel better cheap to the damage of I. S. & yet no cauſe of action, being neither wrong to I. S. nor hurt to the Common-wealth.

The Caſe was this, B. ſaid unto R. that I. S. ſaid, that if he did meet R. he would kill him, whereupon R. for fear of I. S. fled ſo faſt that he killed his horſe: This was damage to him, and yet he had no cauſe of action. So in our Caſe, although the antient Cardſeller do ſell better cheap than Mr. Darcy, yet it is no wrong to him nor to the Common-wealth, ſo no cauſe of Action,

Now to anſwer the Caſes and matters material to be anſwered.

Ob. It is firſt obiected, that it is unlawfull and hurtfull the playing at cards in all parts of the Realms, and therefore reſtrainable by Pat. in all parts of the Realm.

R ſp. I anſwer, that moderate playing at Cards was never thought unlawfull, or prohibited generally, but for ſervants, and in ſome particular manner for ſome perſons, which by the intent of the ſame Laws muſt
12 R. 2. c 6. be thought lawfull for the perſons not thereby prohibited. And Mr. Darcy
1 H. 4. c 9. in his Declaration ſaith: That he made 4000 groſſe of Cards for the
33 H. 8. c. 9. neceſſary uſe of ſubjects, &c. which neceſſary uſe cannot be of a thing hurtfull.

This Patent is no reſtraint of Card-playing, But rather an occaſion of

of increaſe of play, as I can prove plainly, as it is now uſed, and doth but take the trade of making and ſelling of Cards from many perſons, and giveth that trade to one, which is unlawful.

Where it is objected, that an action of Caſe was maintainable for money won by falſe Dice. Object.

This maketh rather againſt the Plaintiff, than with him, for that if it had been won by true Dice, it had been ſo lawfully done, that the party had had no remedy. Reſp.

Where they object a writ in the Regiſter, rehearſing of a grant made to the Abbot of Weſtminſter, That he ſhould have a fair to continue 32 dayes at Weſtminſter, and that none during that time ſhould buy or ſell any Merchandiſe, within ſeven miles of the fair. Object.

To this I anſwer, That upon this writ there was never judgement or allowance given in any Court, and that it is unreaſonable and abſurd that none ſhould buy or ſell within ſeven miles, whatſoever occaſion ſhould happen; as many times men are robbed of their apparel, and then they muſt go ſeven miles to buy new, or goe naked, and there be divers writs in the Regiſter which have no warrant of Law, as action of waſte againſt Tenant for life, when there is a mean remainder for life between. And likewiſe an action of waſt by the heir for waſt done in the time of the Father, which are againſt Law, and it is a fit anſwer to vouch againſt this writ The writ that Thorninge ſaith he hath ſeen in the Regiſter, Precepe domino Regi, which is as abſurd as the other, though in an other degree, which writs are more meet to be concealed than vouched, by ſuch as regard the credit of the Law. But it was adjourned till another day. Reſp.

Dixſon *againſt* Williams.

AN action upon the Caſe was brought againſt Cheſter. And he counts, how the Plaintiff did certain buſineſſes for him the Defendant. And the Defendant ſaid to him, Doe it, and I will repay whatſoever you lay out. And he ſhews that he had expended 4 l. And does not ſhew in certain and particular circa quid. And for that cauſe it was held ill.

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